# Free movement of goods vs. justification of national renewable energy schemes on the grounds of environmental protection

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# *Abstract*

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Abstract

Member States of the European Union have different renewable energy potentials and therefore they operate different schemes of support for energy from renewable sources at the national level. The majority of Member States apply support schemes that grant benefits solely to energy from renewable sources that is produced on their territory.

Currently, already around 70–80% of the investments in electricity generation are targeted to renewable energy sector. In practice, these investments are done by using different kind of support mechanisms. Increasing share of renewable energy sources, such as intermittent solar and wind power in the EU energy mix has created significant changes and this increases the already volatile nature of the electricity market. Because of the increased share of renewables, also the need for the power transmission capacity has increased. The sufficiency of adequate electricity generation capacity in the future raises questions as well. The energy generation system based on the national support schemes is ineffective and distorts the common market whereas also the competitiveness between the Member States. On the other hand, the schemes have been justified by their environmental impact in order to meet the renewable target of the EU.

National support schemes distort competition and are against the EU's fundamental principle of free movement of goods. This Master's thesis aims to examine, based on the relevant European Union regulatory framework, how the existence of these schemes however have been justified and especially by using the predominant environmental purpose as a justification. In addition, there will be consideration about the market distortions caused by the schemes and whether there is a need for harmonization.

Key words

European Union law, renewable energy, national support schemes, free movement of goods

# *Tiivistelmä*

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Tiivistelmä

Euroopan unionin jäsenvaltioiden voimavarat uusiutuvan energian alalla ovat eritasoisia, ja täten ne tukevat uusiutuvista lähteistä peräisin olevan energian käyttöä kansallisella tasolla erilaisin tukijärjestelmin. Suurimmalla osalla jäsenvaltioista on käytössään tukijärjestelmä, joista myönnetään tukea yksinomaan niiden alueella tuotetulle uusiutuvista lähteistä peräisin olevalle energialle.

Jo nyt noin 70–80% Euroopan unionin sähköntuotantoinvestoinneista kohdistuu uusiutuvaan energiaan. Nämä kaikki investoinnit tehdään käytännössä erilaisiin tukimekanismeihin perustuen, jolloin erityisesti vaihtelevatuottoisten aurinko- ja tuulivoiman lisääminen tukien avulla on aiheuttanut merkittäviä muutoksia sähköjärjestelmään ja- markkinoihin. Uusiutuvista lähteistä peräisin olevan energian lisääntymisen myötä sähkönsiirtotarpeet ovat kasvaneet, jonka lisäksi säätökykyisen tuotannon riittävyys tulevaisuudessa on kyseenalaistettu. Kansallisiin tukiin perustuva energiantuotantojärjestelmä on näiltä osin tehoton ja vääristää yhteismarkkinoita sekä jäsenmaiden keskinäistä kilpailukykyä. Toisaalta taas tukijärjestelmiä on perusteltu niiden ympäristövaikutuksilla unionin uusiutuvan energian tavoitteen saavuttamiseksi.

Kansalliset tukijärjestelmät vääristävät kilpailua ja ovat vastoin Euroopan unionin perussopimuksen tavaroiden vapaan liikkuvuuden periaatetta. Tässä pro gradu-tutkimuksessa pyritään selvittämään, kuinka sovellettavan Euroopan unionin oikeuden lainsäädännön puitteissa kansallisten tukijärjestelmien olemassaoloa on kuitenkin perusteltu, ja erityisesti kuinka pitkälle niitä voidaan perustella ympäristönsuojelullisilla tekijöillä. Tutkimuksessa tarkastellaan lisäksi tukijärjestelmien aiheuttamia markkinahaittoja sekä harmonisointitarvetta.

Avainsanat

Eurooppaoikeus, uusiutuva energia, kansalliset tukijärjestelmät, tavaroiden vapaa liikkuvuus

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*Guerra v Italy* no.14967/89, 19.2.1998.

*López Ostra v Spain,* 9.12.1994, Series A, No. 303 – C.

*Powell and Rayner v the United Kingdom* 21.2.1990, Series A, No. 172.

# LIST OF ABBREVIATIONS

| | |
|---|---|
| CJEU | The Court of Justice of the European Union (the Court) |
| CMP11 | The 11th session of the meeting of the parties to the Kyoto Protocol |
| COP21 | The 21st Conference of the Parties to the United Nations Framework Convention on Climate Change |
| CO2 | Carbon Dioxide |
| ECSC | European Coal and Steel Community |
| EC | European Communities |
| ECR | European Court Reports |
| EEA | European Economic Area |
| ETS | Emission Trading Scheme |
| EU | European Union |
| GHG | Greenhouse Gas Emissions |
| IEA | International Energy Agency |
| IRENA | International Renewable Energy Agency |
| UN | United Nations |
| UNFCCC | United Nations Framework Convention on Climate Change |
| OJ | Official Journal |
| RES | Renewable energy sources |
| SEA | Single European Act |
| TEN-E | Council Regulation 347/2013/EU on guidelines for trans-European energy infrastructure as regards the Union list of projects of common interest (2013) OJ L 115/39 |

| | |
|---|---|
| TEU | Treaty on the European Union |
| TFEU | Treaty on the Functioning of the European Union |

# 1 INTRODUCTION

## 1.1 Background for the study

In this first chapter, the use of renewable energy is firstly presented in a larger context in order to enhance its importance. Then European Union's (EU) energy and climate commitments are presented shortly, before moving towards the question of the free movement of goods and renewable energy support schemes, which are creating the foundation for this whole study. Lastly in this chapter, the research objectives and methodology used, whereas also the context and scope of the study are presented.

From 30 November to 11 December 2015 Paris hosted the 21st session of the Conference of the Parties (COP21) to the United Nations Framework Convention on Climate Change (UNFCCC)[1] and the 11th session of the meeting of the parties to the Kyoto Protocol[2] (CMP11). The aim of the Conference was to achieve a new international agreement on climate change[3], applicable to all countries and with an objective to keep global warming under 2°C[4] while boosting transition towards low-carbon and climate-resilient societies and economies.[5]

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[1] United Nations Framework Convention on Climate Change, opened for signature June 4, 1992, S. TREATY DOC. NO.102-38 (1992) (entered into force Mar. 21, 1994).

[2] The final version of the Protocol was issued as part of the Third Conference of the Parties UN DOC. FCCC/CP/1997/7/Add.2.

[3] According to the United Nations Framework Convention on Climate Change Article 1 (2): "Climate change" means a change of climate which is attributed directly or indirectly to human activity that alters the composition of the global atmosphere and which is in addition to natural climate variability observed over comparable time periods. United Nations Framework Convention on Climate Change, opened for signature June 4, 1992, S. TREATY DOC. NO.102-38 (1992) (entered into force Mar. 21, 1994).

[4] Even though the COP21 is aiming for 2 degree target by 2030, the Climate Action Tracker presented a research according to which regardless the need to cut down emissions from coal-fired power generations, there are many governments, and also the EU28, who are yet still planning to build significant amount of coal power capacity. For example in the EU, new coal plants are mostly build to replace existing capacity, in the emerging economies to meet increasing electricity demand. According to research, because of the construction the emissions are going to be four times higher than 2 degree target by 2030. Naturally, the apparent contradiction is caused by politics. The report available at http://climateactiontracker.org/assets/publications/briefing_papers/CAT_Coal_Gap_Briefing_COP21.pdf, (last accessed 9.1.2017).

[5] According to the World Meteorological Organization's (WMO) five-year analysis, it is likely that 2015 will be the world's warmest year on record. Levels of greenhouse gases in the atmosphere reached new highs and in the Northern hemisphere spring 2015 the three-month global average concentration of CO2 crossed the 400 parts per million barrier for the first time. See Provisional Statement on the Status of Global Climate in 2011-2015. Available at https://www.wmo.int/media/content/wmo-2015-likely-be-warmest-record-2011-2015-warmest-five-year-period, (last accessed 9.1.2017).

For the first time in 20 years, the European Union aimed for ambitious, legally binding universal agreement applicable to all countries in order to help to keep global warming below 2°C. Before the conference the EU stated that; the agreement should include clear, fair and ambitious targets for all the countries. Countries' targets should be regularly reviewed and strengthen, and all countries should be held accountable- to each other and to the public- for meeting their targets.[6] The COP21 was keenly awaited and there was a lot of pressure laid down on the negotiators to reach an agreement that would be ambitious enough in order to combat against the climate change.[7] It will be left to be seen how well the agreement will reach its aims.

Energy production and use account for around two-thirds of global greenhouse-gas emissions (GHG), meaning that actions in the energy sector are crucial to addressing the climate change challenge.[8] Renewable energy plays an important part in this battle, both on local and global levels the environmental benefits are compelling and the use of renewables also reduces the risk of ecological disasters.[9] The use of renewable energy sources balances energy trade, whereas also gives a larger choice of energy supply and therefore increases energy security while in addition creating more employment[10] in the energy sector.[11]

## 1.2 Energy in the EU

### *1.2.1 Historical background*

[6] http://ec.europa.eu/priorities/energy-union/emissions-reduction/cop21/index_en.htm.
[7] http://www.lavoixdunord.fr/france-monde/cop21-appels-a-sauver-la-planete-a-l-ouverture-de-la-ia0b0n3191700 (last accessed 9.1.2017).
[8] International Energy Agency's (IEA) Ministerial Statement on Energy and Climate Change, which was intended to provide input to the COP21 meeting emphasizes the close relationship between energy and climate change, and it highlights the need to promote policies and innovation that can facilitate a global transition to a clean energy economy, available at https://www.iea.org/media/news/2015/press/IEA_Ministerial_Statement_on_Energy_and_Climate_Change.pdf (last accessed 9.1.2017).
[9] See for example, IRENA: 'REthinking Energy: Towards a new power system', 2014, p. 17-18, available at http://www.irena.org/rethinking/IRENA_REthinking_fullreport_2014.pdf (last accessed 9.1.2017).
[10] The growing international renewable energy industry is creating new employment around the world. According to IRENA's Renewable Energy and Jobs Annual Review 2015, in 2014 an estimated 7.7 million people worked directly or indirectly in the renewable energy sector in 2014, available at http://www.irena.org/menu/index.aspx?mnu=Subcat&PriMenuID=36&CatID=141&SubcatID=585 (last accessed 9.1.2017).
[11] Johnston, Angus and Block, Guy, *EU Energy Law* (Oxford 2012), p.303.

The EU we know today is based on the European Coal and Steel Community (ECSC).[12] The common European energy policy was basically non-existent until the late 1980s, even though two out of three Communities back then were dealing with energy matters, ECSC and EURATOM[13]. There were also few EC instruments taking care of the minimum standards of the security of gas and oil. Aiming for competitive European energy market, rather than national or regional; the Commission set its goals on Commission directives, with sanctions in a case of failure to fulfill an obligation and harmonization of Member State's legislation. The ongoing constitutional development of the time allowed this more straightforward approach: the new energy legislation was thus based on Article 95 of the EC Treaty (now 114 TFEU[14]) and followed by the Single European Act (SEA) which entered into force in 1987, making it possible for the Commission to propose directives that would bring domestic laws more in line with each other.[15]

Over a century hydrocarbons such as gas, coal and oil, have been the main energy sources. Since 1950s nuclear power has been part of this group as well, but lately there have been also other new dimensions to be considered. The rise of awareness of the environmental issues has added new areas to the field of conventional energy.[16] These areas are focusing to the renewable energy sources and policies.[17]

In the late 1990s and early 2000s numerous legislative measures were adopted in the EU, since the environmental issues and EU's growing energy dependence were concerning the Union. The main objective of the EU's energy policy is to create more competitive, secured and sustainable energy system within the EU. The growing importance of the environmental issues within the Union led to new regulations such as directives on 2001[18]

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[12] Treaty establishing the European Coal and Steel Community was signed in Paris on 18 April 1951 and entered into force on 23 July 1952, with a validity period limited to 50 years. The Treaty expired on 23 July 2002.

[13] Treaty Establishing a European Atomic Community of 25.3.1957.

[14] Consolidated version of the Treaty on the Functioning of the European Union, OJ C 326, 26.10.2012. Hereafter "TFEU".

[15] Talus, Kim, *EU Energy Law and Policy*. 1st edn. (Oxford University Press 2013), p. 21–23.

[16] The climate change issues as a topic of the EU's environmental policy is of recent date. See 4th EU environmental action programme 1987-1992 (1987) OJ C328/5 Pt 2.3.20: "Looking further ahead into the future it is clear that difficult problems could arise from the use of fossil fuels if the build-up of atmospheric carbon dioxide levels and the "Greenhouse effect" are shown to have serious impacts on climate and agricultural productivity worldwide. In case further scientific research should confirm the likelihood of such impacts, the Community should already be thinking about possible responses and alternative energy strategies".

[17] Talus, Kim, *EU Energy Law and Policy*. 1st edn. (OUP 2013), p. 190.

[18] Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, OJ L 283, 27.10.2001, pp.33-40.

and 2003[19], which were considering renewable energy, energy efficiency and biofuels. In order to reduce industrial greenhouse gas emissions, the EU launched its Emissions Trading Scheme (ETS) with the Directive 2003/87/EC[20] in 2005. In 2007, the EU adopted its third climate and energy package.[21] Followed by in January 2014 when the Commission published the energy and the climate policy that aims to accomplish its targets by the 2030.[22] The emission reduction goal concerning the year 2020 is 20 per cent, for the 2030 European Commission proposed that the emission reduction would be 40 per cent compared to the level of 1990. When it comes to renewable energy within the EU, the target is to raise its use from the 2020 goal of 20 per cent up to the 27 per cent by 2030.[23] There is also a plan for a longer time period called The Energy Roadmap for 2050 which includes further built climate objectives for the EU, such as internal energy market and the infrastructure package. All in all, under this Roadmap plan, the aim is to enhance the share of the renewable energy in the EU in a way that it would have the biggest share of the energy supply in the Union by 2050.[24]

In order to create competition and greater market efficiency and therefore lower energy prices for the consumers, yet more integrated continent-wide energy market is still needed.[25] European electricity and gas transmission systems, especially cross-border connections, have not been sufficient enough in order to adjust the increased production

[19] Directive 2003/30/EC of the European Parliament and of the Council of 8 May 2003 on the promotion of the use of biofuels or other renewable fuels for transportation, OJ L 123, 17.5.2003, pp. 42-46.
[20] Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 Establishing a Scheme for Greenhouse Gas Emission Allowance Trading within the Community and Amending Council Directive 96/61/EC, OJ L 275, p. 32-46. The scheme covers energy production plants and the carbon dioxide emissions of large industrial installations and the aim is to cut the emission in a cost-effective way by giving the companies flexibility while doing their cuts. These emission levels are then reduced every year more and more. However, the ETS itself does not reduce emissions, but instead it encourage the companies to find the lowest cost way to achieve a given emissions reduction target.
[21] Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, OJ L 140, 5.6.2009, p.136-148; and Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directive 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, pp.16-62.
[22] Communication from the Commission to the European Parliament, The Council, The European economic and Social Committee and the Committee of the Regions: A policy framework for climate and energy in the period from 2020 to 2030. COM(2014) 15 final, 22.1.2014.
[23] For 2030, the EU framework has proposed: reduce EU domestic greenhouse gas emissions by 40%; increase the share of renewable energy to at least 27%; improve energy efficiency; reform of the EU emissions trading system; aim for competitive, affordable and secure energy and new governance system.
[24] Commission Communication, A roadmap for moving to a competitive low carbon economy in 2050, COM(2011) 112 final, 8.3.2011.
[25] Communications from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Progress towards completing the Internal Energy Market, COM(2014) 634 final, 13.10.2014, p.6.

from renewables and therefore ensure the internal energy market to function properly. The existing market design, whereas also all the different national policies, have not been offering sufficient predictability for the potential investors.[26] Therefore, in order to integrate the renewable energy sources (RES) better, European Commission launched its strategy for a European Energy Union.[27]

As a step forward, on 30 November 2016 the Commission presented its "Clean Energy For All Europeans" package, more commonly known as the "*Winter Package*", which consists numerous legislative proposals in order to strengthen the EU's competitiveness in adopting and leading the clean energy transition.[28] The Package was keenly awaited by the energy industry since it was expected to contain the energy regulations for 2020 onwards. As it was expected, the most substantial proposals are concerning energy efficiency and renewables in the EU. In addition, also the design for electricity market is proposed to be amended in order to further completing the internal market for electricity and implementing the Energy Union. The Winter Package is a part of the overall package which was first announced already in 2015 consisting over 40 planned measures aiming to further standardizing the European Union's energy market.

The Energy Union is based on three long-term objectives of EU energy policy: security of supply, sustainability and competitiveness. In order to reach these objectives, there are five mutually supportive dimensions: Energy security, solidarity and trust; the internal energy market; energy efficiency as a contribution to the moderation of energy demand; decarbonisation of the economy; and research, innovation and competitiveness.[29]

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[26] Communications from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Progress towards completing the Internal Energy Market, COM(2014) 634 final, 13.10.2014, p.9. Bjørnebye Henrik, *Investing in EU Energy Security: Exploring the Regulatory Approach to Tomorrow's Electricity Production* (University of Oslo, PhD thesis, 2009), p.207-208.

[27]Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank A Framework Strategy for a Resilient Energy Union with a Forward-Looking Climate Change Policy, COM(2015) 080 final, 25.2.2015.

[28] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the regions and the European Investment Bank: Clean Energy For All Europeans, COM(2016) 0860 final, 30.11.2016.

[29] According to Commission, these dimensions are the ones that require more integration and coordination. Within these dimensions, the action plan annexed to the framework strategy presents specific measures that will be prepared and implemented over the next years. This action plan will be monitored and reviewed regularly in order to ensure that it is still responding to evolving challenges and new developments.

*1.2.2 Short overview of the conflict between the free movement of goods and renewable energy subsidies in the EU*

At the beginning the liberalization of the EU energy market was rather market-based, but lately the approach has changed to be wider. Although, the main focus has not changed from the competition and liberation of the market to the "softer" environmental issues, more the opposite. In the energy sector there are now environmental policy goals and security of supply oriented objectives besides the Union's objectives of competition and market liberation. Both of these dimensions are very crucial for the Union's energy sector. A good example of this kind of approach can be seen especially in the provisions of the Third Energy Package Directives.[30]

Sometimes it is challenging to pursue goals of free competition and at the same time to take care of the environmental protection.[31] It all comes down to weighting these sometimes conflicting aims. For example, the Court of Justice of the European Union ("the CJEU" or "the Court"), has recognized the security of supply to be one of the most important interest of the EU's energy policy.[32] However, there is a clear conflict between this key interest and environmental protection objectives that are mentioned in the Article 191 TFEU.[33]

Developing three EU-energy packages can be seen as a strong sign of a desire to increase the EU-level energy specification of measures, institutions and responsibilities. On the other hand, there has been an ongoing discussion[34] about the EU-level harmonization of the national support schemes for the promotion of electricity generated from the renewable

[30] Directive 2009/72/EC of the European Parliament and of the Council of 13 July 2009 concerning common rules for internal market in electricity and repealing Directive 2003/54/EC, OJ L 211, 14.8.2009, p.55-93. (Electricity Market Directive); Directive 2003/54/EC of the European Parliament and of the Council of 26 June 2003 concerning common rules for the internal market in electricity and repealing Directive 96/92/EC, OJ L 176, 15.7.2003, p.37-56; and Directive 96/92/EC of the internal market in electricity, OJ L 27, 30.01.1997, p.20-29. Many of these provisions are still concentrating mainly on the competition and liberalization of the market, but there are provisions as well that are aiming to give more value for the environmental issues and pursue environmental goals, see for example Johnston, Angus and Block, Guy, *EU Energy Law* (OUP 2012), p. 25.

[31] Bjørnebye, Henrik, *Investing in EU Energy Security: Exploring the Regulatory Approach to Tomorrow's Electricity Production* (University of Oslo, PhD thesis, 2009), p. 59.

[32] See for example cases: C-72/83 *Campus Oil* [1984] ECR 2727 and C-347/88 *Commission v. Greece* [1990] ECR I-4747.

[33] See more for example Krämer, Ludwig, *EU Environmental Law* 7th ed. (2012), p.9.

[34] See for example; Ruche, Tim Maxian, *EU Renewable Electricity Law and Policy- From national targets to a Common Market*, (Cambridge University Press 2015). Szydło, Marek, 'How to reconcile national support for renewable energy with internal market obligations? The task for the EU legislature after Ålands Vindkraft and Essent' 52 *Common Market Law Review*, Issue 2, pp. 489–510. (Kluwer Law International 2015).

energy sources. Before the adoption of the First Renewable Directive, in the progress report[35] and in the Commission's proposal[36] whereas also in the final version of the Second Renewable Directive, these aims of harmonization were already there to be seen. As a result, the proposal to establish the possibility of inter-private party trade in Guarantees of Origin was rejected. A much more detailed EU regime for assessing the sustainability of biofuels under the same Directive was however established.[37] The proposed changes in the new Winter Package regarding the national schemes will be discussed more specifically later on in this study.

Directive 2009/28/EC[38] on the promotion of the use of energy from renewable sources replaced the previous directives. The 20-20-20 goals set three key objectives for the year 2020: (i) a 20 per cent reduction in EU greenhouse gas emissions from 1990 levels; (ii) increasing the share of EU energy consumption produced from renewable resources to 20 per cent; (iii) a 20 per cent improvement in the EU's energy efficiency. The new Directive takes quite straightforward approach in order to reach these targets. The Member States are obliged to national targets set by the EU and make a national action plan how to achieve these targets. The national targets vary between the Member States since the share of the renewable energy of all energy consumption is different in every Member State.[39] In order to reach these targets, the Directive states that Member States may use different support schemes or work together with some other Member State or even with a third country.[40] The concept of support scheme is very broadly defined in the Directive, and the support may be divided into investment or operating support.[41]

Article 2 of the Directive 2009/28/EC contains a definition of a support scheme according to which:

> *"any instrument, scheme or mechanism applied by the Member States that promotes the use of energy from renewable sources by reducing the cost of that energy"*

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[35] Commission Communication: The Renewable Energy Progress Report, COM(2009) 192 final, 24.9.2009.
[36] Commission: Proposal for a Directive on the Promotion of the Use of Energy from Renewable Sources, COM(2008) 19 final, 23.1.2008,14 ff.
[37] Johnston, Angus and Block, Guy, *EU Energy Law* (Oxford 2012), p. 6.
[38] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140, 5.6.2009, p. 16-62.
[39] Talus, Kim, *EU Energy Law and Policy*. 1st edn. (OUP 2013), p. 190.
[40] Article 3 (3) of Directive 2009/28/EC.
[41] Article 2 of Directive 2009/28/EC.

The support schemes are designed to help to compensate the various market failures that may affect negatively to the renewable energy at the market compared to conventional energy, such as gas and oil. The different variations of the support schemes and their impact on trade will be discussed more specifically later on this study.

As just stated above, the three main objectives of the EU energy policy are: competition and competitiveness, security of supply and sustainability. Therefore these three are strongly reflected in the EU's legislation and policy measures within the area.[42] Previously, the debate mainly focused on the relation between the EU state aid law and the green energy subsidy systems in the Member States.[43] However, more recently the compatibility between the national renewable energy schemes and the EU law, especially with the principle of the free movement of goods, has become a hot topic both in the political discussions, as well as, in the legal debates.[44] There have been number of cases brought before the Court of Justice of the European Union concerning the relationship between competition and internal market and on the other hand sustainable and environmental energy production.[45]

Member States have different potential on a renewable energy sector and therefore they operate different kind of national schemes of support. Most of Member States grant

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[42] Talus, Kim, '*The Interface between EU Energy, Environmental and Competition Law in Finland'*, vol 10-issue 4, OGEL (2012) p.19, www.ogel.org.

[43]When considering the internal market, the issue of State aid is an inherent part of it, while also creating a more coherent understanding of functioning of the EU law in the environmental and energy context, see De Cecco, Francesco, *State aid and the European Economic Constitution* (Hart Publishing Oxford 2013) p. 31. See also, Von Unger, Moritz, 'Germany's renewable Energy Law, State Aid and Internal Market', *Journal for European Environmental & Planning Law* (2014) vol.11, issue 2, pp. 116-136.

[44]Steinbach, Armin and Brueckmann, Robert, 'Renewable energy and the free movement of goods', *Journal of Environmental Law*, Vol.27 (1), p. 1-16. More generally about the relationship between the energy and environmental provisions see; Bjørnebye Henrik, 'Investing in EU Energy Security: Exploring the Regulatory Approach to Tomorrow's Electricity Production', *Energy and Environmental Law and Policy Series*, Volume 11/2010; Talus, Kim*, EU Energy Law and Policy*. 1st edn. (OUP 2013); De Sadeleer, Nicolas. *EU Environmental Law and the Internal Market.* 1st edn*.* (OUP 2014); Johnston, Angus and Van der Marel, Eva, 'Ad Lucem? Interpreting the New EU Energy provision and in particular the Meaning of Article 194 (2) TFEU', *European Energy and Environmental Law review*, (2013), p. 181-199; Cameron, Peter, *Competition in Energy Markets: Law and Regulation in the European* Union 2nd ed. (OUP, 2008). See also Frenz, Walter and Kane, A., 'Die Neue Europäische Energiepolitik', 32:7 *Natur und Recht* (2010), p. 464 and EEX Panel Discussion: The Elephant in the Room – Harmonisation and Governance of renewables support schemes in Europe, 4th September 2014, available at https://www.eex.com/blob/80162/12fe2133cdaf21f67a3b164fdca5ed80/20140810-eex-panel-discussion-2014-summary-pdf-data.pdf (last accessed 9.1.2017).

[45] C-320/03 *Commission v Austria* [2005] ECR 1-9871, para. 85. Para 72 with further references to C- 240/83 *ADBHU* [1985] ECR 531, para. 13, C-302/86 *Commission v Denmark* [1988] ECR 4607, para. 8, C-213/96 *Outokumpu* [1998] ECR I-1777, para. 32. C-2/10, *Azienda Agro-Zootecnica Franchini Sarl, Eolica di Altamura Srl v. Regione Puglia* [2011] ECR I-06561.

support scheme benefits solely to energy that is produced from renewable sources situated on their territory. Member States are allowed to control the effect and costs of their scheme according to their own potential. Two or more Member States may however decide, on a voluntary basis, to join or partly coordinate their national support schemes, in such cases where it does not prejudice to the obligations of Member States as stated in Article 3 of the Directive 2009/28/EC. This allows them to agree on the extent to which one Member State would support the energy production in other Member State.[46] When granting support only for national producers, this may create territorial restrictions that are hindering the free movement of goods in the internal market. Free movement of goods is one of the fundamental freedoms provided in the TFEU. Whereas the national support schemes promoting renewable energy usage are protected by the secondary legislation.

Especially during the 2000s, there has been increasing number of cases concerning national support schemes brought before the CJEU[47]; therefore it is clear that the matter needs more specific clarification. When considering the compatibility of renewable energy schemes with the principle of free movement of goods, especially the CJEU's ruling *Ålands Vindkraft*[48] was at the very heart of this debate. Advocate General *Bot* argued that the Swedish certificate system was incompatible with the EU law since it was against the principle of free movement of goods.[49]

However, according to CJEU the Swedish certificate system was not against the principle of free movement of goods and the Member States *de facto* have the right to discriminate foreign energy suppliers when deciding who is eligible for the national renewable energy subsidies. The decision could not have been more in contradistinction with Advocate General Bot's arguments and naturally this raised questions in the legal literature as well.[50] When looking at the bigger picture around the recently discussed cases, it raises interesting

[46] See the recitals 25, 35, 36 and Article 11 of Directive 2009/28/EC.
[47] See for example the case C-379/98 *PreussenElektra*, [2001] ECR I-2099 and Joined Cases C-204/12 to C-208/12, *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteitsen Gasmarkt* [2014] ECLI:EU:C:2014:2192. The Outokumpu case was decided even earlier, see C-213/96 *Outokumpu* [1998] ECR I-1777.
[48] C-573/12 *Ålands Vindkraft AB v. Energimyndigheten* [2014] ECLI:EU:C:2014:2037.
[49] Opinion of Advocate General Bot C-573/12 *Ålands Vindkraft AB v. Energimyndigheten* [2014] ECLI:EU:C:2014: 37.
[50] Scholz, Lydia, 'The dialogue between free movement of goods and the national law of renewable energies' in *Marius* nr. 446 p.92. Bjørnebye, Henrik, '*Joined Cases C-204/12 to C-208/12, Essent Belgium'*, vol.13-issue 3, OGEL (2015), www.ogel.org. See also Penttinen, Sirja-Leena, '*Ålands Vindkraft AB v Energimyndigheten - The Free Movement Law Perspective'*, vol. 13 - issue 3, OGEL (2015), www.ogel.org.

questions in relation to the current role of the state in the EU energy market and the application of free movement law. Some of the key cases will be presented and discussed more specifically later on this study.

### 1.3 Research objectives and methodology

This Master's thesis aims to examine and systematize the relevant European Union regulatory framework that controls the renewable energy schemes. The primary research question this thesis aims to answer is *whether national support schemes can be justified on the grounds of environmental protection even when they are intervening the free movement of goods within the EU, and where goes the fine line of justification?*

The focus of this thesis will be legal. The legal examination in this study will take into consideration the primary and the secondary EU legislation, as well as relevant EU case law and preparatory documents. In addition, it should be noted that the EU materials and preparatory documents used for the legal assessment will naturally have very different levels of interpretational value. When considering the purpose and nature of primary and secondary legislation in the light of this study, one could ask if there is a risk of a misinterpretation at the national level in regards of the boundary between energy security and environmental protection. One should keep this question in mind while moving forward in this study.

The structure of this thesis is as follows. After the introduction, section 2 defines, examines and systematizes the shared competence; the renewable energy sources; the support schemes for renewable energy within the EU and the predominant environmental purpose. Then, section 3 concentrates on the principle of free movement of goods and clears out when the intervention in the free movement principle may be justified. Section 4 presents the relevant CJEU's case-law. Section 5 concentrates on the issues that support schemes may be causing and whether in the future the schemes should be harmonized or not. Finally, section 6 concludes.

### 1.4 Context and scope

This Master's thesis focuses on renewable energy schemes and their compatibility with the EU law. The concept of the renewable energy schemes in the EU, however, is part of a wider discussion regarding the (dis)functioning of European internal energy market

("IEM"). All in all, the internal energy market has been developing more or less the past 20 years, and therefore in order to fully understand how the renewable energy fits in the current EU energy market, a historical overview is shortly presented in the different parts of the Thesis. However, more detailed discussion of the development of the EU energy market, in general, is left outside of this study.

The political aspect[51] of the energy cannot be underestimated, however wider discussion has to be excluded from this study since it would require too specific evaluation compared to the purpose of this study. However, one should keep in mind that renewable energy is part of a larger context and in some cases it needs to be considered from different perspectives.

When it comes to the terminology used in this study, it should be noted that even though this examination will concentrate on different renewable energy sources, it does not concentrate on making a specific separation between them, therefore the terminology often refers to "energy" or "renewable energy" in general. The separation or clarification is only made in case where it is needed in order to clarify some specific matter.

Some of the material used in this study, such as preparatory documents and CJEU's case law, are from before the Lisbon Treaty[52]. In order to avoid inconsistency, the numbering of the Treaty provisions has been updated or other way cleared out to reflect the current regulatory system.

Next, more specific definitions for; the shared competence in the field of energy, national support schemes and the predominant environmental purpose will be declared and discussed.

[51] Belyi, Andrei V., '*International energy law, institutions and geopolitics'* in Research handbook on International Energy Law ed. Kim Talus (2014), p. 624-650. Schill, Stephan W., '*The Interface Between National and International Energy Law*' in Research Handbook on International Energy Law ed. Kim Talus (2014), p. 44-76; Johnston, Angus and Block, Guy, *EU Energy Law* (Oxford 2012), p. 9-28; Talus, Kim, *EU Energy Law and Policy*. 1st edn. (OUP 2013), p.7.

[52] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed at Lisbon, OJ C 306, 17 December 2007.

# 2 DEFINING THE KEY ELEMENTS OF THE STUDY

## 2.1 Competences

### *2.1.1 Shared competence between the EU and Member States in the field of energy*

In this second chapter the construction of the support schemes are presented more specifically. Firstly, the competences within the EU energy field is being discussed and declared with the help of a short analysis of the relationship between Articles 192 TFEU and 194 TFEU, which have been raising questions in some contexts. Then, there are more specific definitions on what is meant in this study when talking about renewable energy sources, national support schemes and predominant environmental purpose.

Energy law covers all sources of energy, energy production, transport and distribution. It concerns all possible legal relationships between energy consumers, producers, states, companies and governments; therefore it is not only private and public law relations that cuts cross but it is also a matter of national and international law in the trans-border relations.[53] Domestic law and politics define the objectives and means of national energy law. From the functional point of view national law is the one ensuring the operation of energy market, however today's international energy markets and therefore international energy law complements the national one in order to achieve common energy policy goals.[54]

Energy is considered to be rather sensitive sector, both economically and politically, and for a long time there were no willingness to start tackling any further with such area as energy.[55] Therefore, EU's energy market stayed for long nationally divided and national energy needs were handled by Member States' monopolies.[56] The creation of the single European energy market started rather late, in the end of 1980s. Firstly, the trade barriers to export and import of energy within the EU were stated to be incompatible with the internal market, this lead further to adoption of secondary legislation. As mentioned already at the

[53] Schill Stephan W., '*The Interface Between National and International Energy Law*' in Research Handbook on international Energy Law ed. Kim Talus. p. 44.
[54] *Ibid.* pp. 57-59, 64.
[55] Johnston, Angus and Block, Guy, *EU Energy Law* (Oxford 2012), p.10.
[56] Talus, Kim and Hunt, Michël, '*Ownership Unbundling: What End to the Saga*?', in D. Buschle, S. Hirsbrunner and C. Kaddous (eds), European Energy Law, Droit Européen de l'énergie (Helbing Lichtenhahn 2011), p. 27.

beginning of this study, almost non-existent EU energy law and policy has gone through major changes since the early 2000s.[57]

The creation of a specific energy chapter has been a long process and "subsequent attempts to include a chapter on energy, during the negotiations on the Maastricht [58] and Amsterdam[59] Treaties resulted in failure".[60] Maastricht Treaty at least introduced energy in its Article 3(1) TFEU even thought there was not a specific energy provision within the Treaty itself.[61] Therefore, it was not feasible to develop a mature EU energy policy at the Treaty level before the Lisbon Treaty and the Article 194 TFEU.

By the reforms of the Lisbon Treaty, for the first time energy policy was included to be part of the EU´s competence in the founding Treaties: Article 4(2) (i) TFEU. Energy was previously handled under the internal market legal basis Article 114 TFEU, whereas on the environmental related issues under Article 192 TFEU and when concerning implied EU powers under Article 352 TFEU. The inclusion of a specific energy provision can be seen as an important part of the development in order to empower the EU in the energy field.[62]

As stated in the Treaty,[63] there is a shared competence between the EU and the Member States in the field of energy. In the other words, based on the Article 2(2) TFEU this means that in principle both, Member States whereas also the Union may adopt legally binding acts in the field of energy. However, Member States *"shall exercise their competence to the extent that the Union has not exercised its competence"* or *"if it has decided to cease exercising its competence"*. Therefore, Member States are not allowed to exercise their competence, if the Union has already adopted a legal act in that area, eliminating the

[57] Penttinen, Sirja-Leena, *'The Role of the Court of Justice of the European Union in the Energy Market Liberalization'* in Kim Talus (ed.), Research Handbook on International Energy Law 2014 p. 270.
[58] *Treaty on European Union (Treaty on Maastricht*). Official Journal of the European Union, 29.07.1992 C 191.
[59] *Treaty of Amsterdam amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts*. Official Journal of the European Union, 10.11.1997 C 340/1.
[60] Green Paper - Towards a European strategy for the security of energy supply COM(2000) 0769 final, 29.11.2000, p. 12.
[61] Blumann, Claude, 'Les compétences de l'Union européenne dans le domaine de l'énergie', *Revue des Affaires Européennes*, 4, (2009 – 2010), p. 738.
[62] Johnston, Angus and Block, Guy, *EU Energy Law* (Oxford 2012), p. 4-5.
[63] Article 194 TFEU.

possibility of "concurrent legislation"[64].[65] The EU has not act upon the renewable support schemes and subsequently, Member States are competent to create their national schemes.

The aforementioned distinction of competences is presented more clearly in the new chapter XXI entitled *Energy.* Article 194 TFEU lists the main aims of the EU's energy policy in its paragraph 1, namely:

> *"a) ensure the functioning of the energy market; (b) ensure security of energy supply in the Union; (c) promote energy efficiency and energy saving and the development of new and renewable forms of energy; and (d) promote the interconnection of energy networks."*

The objectives are sided by the statutory provisions according to which EU's energy policy will take place "*in a spirit of solidarity between Member States"*, and also *"in the context of establishment and functioning of the internal market"* emphasizing *"the need to preserve and improve the environment"*.

The second paragraph of the Article 194 TFEU has the proper policy enabling clause. According to the clause, the Council and the European Parliament: *"shall establish the measures necessary to achieve the objectives in paragraph 1*". Clearly this clause clarifies EU's ability to act in the field of energy.[66]

The competence, as it is set out in the article 194(2) TFEU, could also been seen as more general as it empowers the EU to *"establish the measures necessary to achieve the objectives in paragraph 1".*[67] In addition, Article 194 TFEU highlights the existing legislative powers of the EU *"without prejudice to the application of the other provisions of the Treaties",* which does stay applicable also in the energy sector. This in mind, it is possible to see that the Treaty provision was a result of a political compromise.[68]

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[64] See Article 2(2) TFEU together with the more specific clarification No. 18 in order to see distinction of competences and protocols on the exercise of shared competence.

[65] Pielow, Johann-Christian and Lewendel Britta Janina, 'Beyond "Lisbon": EU Competences in the field of Energy Policy', *EU energy Law and policy Issues. ELRF Collection* vol. 3. Bram Delvaux, Michaël Hunt, Kim Talus (Eds.). (Cambridge 2012), p. 267.

[66] Kuhlmann, Josefine, 'Kompetenzrechtliche Neuerungen im europäischen Energierecht nach dem Vertrag von Lissabon'. *EI Working Papers / Europainstitut*, 79. Europainstitut, WU Vienna University of Economics and Business, Vienna. (2008), p 25, available at: http://epub.wu.ac.at/1072/1/document.pdf (last accessed in 9.1.2017).

[67] Pielow, Johann-Christian, *'Nouvelles compétences dans la politique de l´énergie et Services d´intérêt général ',* in A Berramdane, W. Cremer, A. Puttler and J. Rosetto (eds.), Quel avenir pour l´intégration européenne ? Regard croisé franco-allemand sur le traité de Lisbonne (Tours : Presses Universitaires François Rabelais, 2010), p.7.

[68] One could say that the authors of Treaty did not want to allow the EU to develop its energy policy beyond the existing limits that are imposed by the competence rules and general internal market rules. On the other

However, Member States' competence regarding the schemes does not come without reservations. The Commission has stated that, while recognizing the Member States' right to choose energy policies that are the most suitable to their national energy mix and preferences, this however does not mean that Member States can adopt measures that are incompatible with the objectives of market integration, competition and other energy and climate objectives.[69]

The competence question is important here, because in the recent years, as it will presented in this study, the Commission has been trying to get the schemes to be part of the internal energy market, whereas Member States sees the schemes to be clearly under the national sovereignty. One should keep this "conflict" in mind throughout the study.

*2.1.2 The relationship between Articles 192 TFEU and 194 TFEU*

One could say that is rather unclear where Article 192 TFEU ends and Article 194 TFEU starts and therefore this confusion could possibly lead to misinterpretations in sense of the purpose and spirit of primary and secondary legislation at the Member States. There are the functioning and scope of the competences allocated to the EU when the measures are falling within both the energy and the environmental domains at the same time. Furthermore, this kind of evolution may lead to significant spill-over effects more towards a sustainable EU energy policy.[70]

One cannot find an explicit reference to renewable energy promotion within the environmental provision itself, but Article 192 (2)(c) TFEU actually repeats the measures stated in Article 194 (2) TFEU second paragraph.[71] While Article 194 (1)(c) TFEU gives the EU competence in the area of developing new and renewable forms of energy, Article 194 (2) second subparagraph states that the measures shall *"not affect a Member State's*

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hand, it is also possible to argue that regardless of the listed restrictions, the new energy chapter de facto strengthened the EU´s competence in the energy sector. See more; Pielow, Johann-Christian and Lewendel, Britta Janina, 'Beyond "Lisbon": EU Competences in the field of Energy Policy'. *EU energy Law and policy Issues. ELRF Collection* vol. 3. Bram Delvaux, Michaël Hunt, Kim Talus (Eds.). (Cambridge 2012), p. 267-269.

[69] Communications from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A policy framework for climate and energy in the period from 2020 to 2030, Com(2014) 15 final, 22.1.2014, p.12.

[70] Sveen, Thea, 'The interaction between Article 192 and 194 TFEU'. EU Renewable Energy Law- Legal challenges and new perspectives; *MarIus* nr. 466, pp.157-183, p.160.

[71] Also *Johnston* and *van de Marel* were highlighting the fact that there is no mention of the conditions regarding the exploitation of the energy resources in Article 192 (2) (c) TFEU. Johnston, Angus and van der Marel, Eva, 'Ad Lucem? Interpreting the New EU Energy provision and in particular the Meaning of Article 194 (2) TFEU', *European Energy and Environmental Law review* (2013), p. 196.

*right to determine the conditions for exploiting its energy resources, its choice between energy sources and the general structure of its energy supply"* without prejudice to Article 192 (2) TFEU where the decisions has to be adopted according to a special legislative procedure with unanimity and after consultation of the other EU bodies.[72]

Article 194 (2) and 194 (3) TFEU limits the EU´s competence in energy. According to first mentioned:

> *"measures [taken under Article 194 TFEU and majority voting] shall not affect a Member State's right to determine the conditions for exploiting it energy resources, its choice between different energy sources and the general structure of its energy supply, without prejudice to Article 192 (2)(c)."*

Whereas Article 192 (2)(c) TFEU states that;

> *"measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply, are to be taken in unanimity."*

Therefore, one could assume the new Energy title in the Treaty should *a priori* not restrict Member States choices in regards of energy sources. Nevertheless, the current practice, which is dated before the TFEU changes by the Lisbon Treaty, indicates that it might not be such a clear cut.[73] Even though the Member States may choose their energy mixes and national energy policies, the legislative acts related to the climate change are falling under environmental policy and are therefore adopted within this area despite their impacts on Member States.

Although, one must note that the far reaching national targets, which are also affecting to the national energy mix and Member States right to make choices between the sources of energy supply, were actually set prior to the changes of the TFEU. It would seem the TFEU does not significantly change the situation's status quo ex ante. When looking at the content of the new Energy title, and also the activities of the EU in the energy market prior the EU energy acquis inclusion, one could argue that the impact of the inclusion is limited. Perhaps the primary effects could be; firstly, to give the EU confidence to take even bigger steps and further in the area of EU energy and secondly, to protect the Member States from the actions of the EU. More specifically protect the Member States from the actions which

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[72] *Ibid*. p. 192.
[73] Talus, Kim '*The Interface between EU Energy, Environmental and Competition Law in Finland*', vol. 10-issue 4 (OGEL 2012), p.37.www.ogel.org.

could, for example prohibit completely the use of nuclear energy as a specific source of energy.[74]

There is a clear difference between the wording of these two provisions; the energy provision and the environmental provision. Under the regime of environmental policy of the EU, the legislator may override the Member States' interest only by *unanimous* decision of the Council. Whereas Article 192 TFEU provides unanimity only in the case where EU's measures can be considered to be *significantly*[75] affecting to the Member States energy sector, in other words, Member States cannot veto or legislate against any change of the status quo. As comparison, the reserve clause in Article 194 (2) TFEU contains a bit more relative escape clause: it only requires unanimous decision when the measures concerned *are primarily of a fiscal nature,* not only against the *essential* energy policy on the national level. Therefore the EU's legislative measures are actually possible, even if Member States would be heading to other direction with their national measures. The Member States bear an obligation to abstain from any measure which could be against the EU's objectives, to take all measures necessary to ensure the implementation of European obligations and to facilitate to accomplish the mission of the EU as laid down in Article 4 (3) TFEU and 3 TFEU.[76] Although, one could argue that if the EU's legislative measures are allowed independently, even if against national provisions, the latter ones may possibly infringe the Member States commitments to the common aims of the EU.

While the environmental and energy legislation of the EU becomes more detailed and intertwined, it will become even harder to see where the EU has not preempted Member State action.[77] Therefore, one could argue that shared competence could have some traits of an exclusive competence when the environmental protection is intertwined with the EU energy policy goals.[78] Against this background, EU's energy measures could possibly reduce the scope of action that Member States may do, whereas also their decision making

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[74] Talus, Kim, *EU Energy Law and Policy*. 1st edn. (OUP 2013), p.179-180.
[75] More consideration about the word "significant", see for example; Directive 2011/92/EU of 13 December 2011 on the Assessment of the Effects of Certain Public and Private Projects on the Environment, [2012] OJ L26/1. See also cases C-288/07 *Isle of Wight Council e.a*. [2008] ECR 7203 and C-378/02 *Waterschap Zeeuws Vlaanderen* [2005] ECR I-4685, Opinion of Advocate-General Jacobs, delivered on 18 November 2004, at para.41.
[76] Pielow, Johann-Christian and Lewendel, Britta Janina, 'Beyond "Lisbon": EU Competences in the field of Energy Policy. *EU energy Law and policy Issues. ELRF Collection* vol. 3. Bram Delvaux, Michaël Hunt, Kim Talus (Eds.). (Cambridge 2012) p. 269.
[77]Sveen, Thea, 'The interaction between Article 192 and 194 TFEU'. EU Renewable Energy Law- Legal challenges and new perspectives; *MarIus* nr. 466, pp.157-183, p. 162.
[78] Jaqué, Jean Paul, *Droit institutionel de l'Union européenne*, 7th ed. Cours Dalloz 2012, p. 156.

or opting out-freedom could be reduced close to zero.[79] There will be more consideration about this matter later on this study when discussing about the binding EU-level targets, next however the concentration will be on the actual renewable energy sources and how they are defined.

## 2.2 Support schemes for renewable energy

### *2.2.1 Defining renewable energy sources*

Before getting into support schemes, it is important to define what are meant with renewable energy sources as such. The Renewable Energy Directive 2009/28/EC ("the Second Renewables Directive")[80] defines "renewables" in its Article 2 (a):

> *"energy from renewable sources' means energy from renewable non-fossil sources, namely wind, solar, aerothermal, geothermal, hydrothermal and ocean energy, hydropower, biomass, landfill gas, sewage treatment plant gas and biogases;"*

However, the list is open-ended and consists only examples, since in future the new energy sources may be both non-fossil and renewable and therefore it would not be considered as renewable energy, unless it would fit to the energy forms listed in the definition.[81]

Although Directive's definition should be interpreted in a restrictive way, multifuel plants using conventional and renewable energy sources[82] can be considered to be part of the list. This can be drawn from the second paragraph of Article 5 (3) 2009/28/EC[83] where gross final consumption of electricity from renewable energy sources shall be calculated as the quantity of electricity produced in a Member State from renewable energy sources. In other words, in multi-fuel plants where the part of the electricity has been produced from the RES shall be taken into account.[84]

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[79] Pielow, Johann-Christian, *'Nouvelles compétences dans la politique de l´énergie et Services d´intérêt général* ', in A Berramdane, W. Cremer, A. Puttler and J. Rosetto (eds.), Quel avenir pour l´intégration européenne ? Regard croisé franco-allemand sur le traité de Lisbonne (Tours : Presses Universitaires François Rabelais, 2010), p.7. For example, in the situation where the EU is making an international treaties with energy exporting countries this could possibly restrict Member States possibility to act or even affect to their supply undertakings. Pielow, Johann-Christian and Lewendel, Britta Janina, 'Beyond "Lisbon": EU Competences in the field of Energy Policy'. *EU energy Law and policy Issues. ELRF Collection* vol. 3. Bram Delvaux, Michaël Hunt, Kim Talus (Eds.) (Cambridge 2012), p. 269.

[80] Directive 2009/28/EC.

[81] Johnston, Angus and Block, Guy, *EU Energy Law* (Oxford 2012), p.308.

[82] So called "hybrid plants".

[83] Art 5(3) of Directive 2009/28/EC.

[84] Johnston, Angus and Block, Guy, *EU Energy Law* (Oxford 2012), p.308.

The Commission has emphasized how the renewable energy sources ("RES") are indispensable alternatives to fossil fuels.[85] RES play an important part in the battle against the climate change and ensuring the energy security.[86] As stated before, energy policy in the area of renewables has a clear impact on the climate; the objective is to create more competitive, secured and sustainable energy system within the EU. The goal of 2020 to have 20 per cent renewable energy production was based on Member State targets[87] and is to be reached.[88] In the framework proposal[89], increasing the share of the renewable energy in the Union was set to be at least 27 per cent of all the energy consumption in the EU by the 2030. A 27 per cent renewable energy target is binding at an aggregate European level, but not binding upon individual Member States as the previous one.[90] This way Member States are more flexible to transform their energy system in a way that it fits better to their national preferences and circumstances.[91] Subsequently, the energy investments are linked closely to the public sector and host states' energy policies, national regulatory frameworks and any changes in these ones. Member States' support schemes for promoting the use of renewable energy will be examined next.

### *2.2.2 Defining national support schemes*

EU's renewable targets have been affecting to the regional and national energy markets within the EU. In the last few decades the renewable energy solutions have been increasing, but yet still traditional energy sources are running the markets, mainly due to their lower prices. Since, in general, the green energy projects are still more expensive than traditional production of energy; new innovations are more costly than using the already existing production.[92] Therefore they need subsidies and state support in different forms.[93]

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[85] http://ec.europa.eu/energy/en/topics/renewable-energy (last accessed 9.1.2017).
[86] The use of renewable energy sources reduces the greenhouse gas emissions, balances our energy trade, whereas also gives us a larger choice of energy supply while creating more employment in the energy sector. Johnston, Angus and Block, Guy, *EU Energy Law* (Oxford 2012), p.303.
[87] Directive 2009/28/EC.
[88] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, a policy framework for climate and energy in the period from 2020 to 2030 COM(2014) 15 final, 22.1.2014, p. 2.
[89] *Ibid.*
[90] *Ibid.* p. 6.
[91] *Ibid.* pp.6-7.
[92] However, one should not generalize, since the renewables have come a long way from a niche technology to be a part of the mainstream. See more consideration about the matter EurActive-Special report: Electricity in transition. 21-25 November 2016, available at; http://en.euractiv.eu/wp-content/uploads/sites/2/special-report/EurActiv-Special-Report-Electricity-in-transition.pdf (last accessed 15.1.2017).
[93] Although, in April 2016, the Commission's interim report concluded that Member States should be "more through" when assessing if their schemes are truly cost-effective or distort the market, and in addition

Member States have been implementing their national policies to comply with the EU's targets, for example national roadmaps and support schemes for renewable energy. Consequently, there is a possibility for a tension between this objective which contains getting preferential treatment and the competitive framework in which this happens.[94]

Subsidies distort market. Thus, the EU must be able to monitor and also limit the subsidies and tax exemption regimes that may distort the common market even though they would help the individual Member States to achieve their national objectives.[95] How the individual Member States should then be able to form their national climate change policies that liberalized market cannot or will not support? The Commission has been trying to balance the importance of creating a common market whereas also achieving the environmental and social objectives that the market will not support on its own.[96]

In order to achieve common renewable energy goals, as already said, renewable energy is promoted across the EU. Already the First Renewables Directive 2001/77/EC[97] set down an important framework for national support schemes. Based firstly on this Directive, Member States have laid down different national support schemes for promoting renewable energy. They have also invented various instruments to compensate market failures that could place renewable energy at a competitive disadvantage compared to conventional energy.[98] Mostly, for so far, the national support schemes have been limited in to the territory of that state which issued them by legislative measures.[99] However, later on in this study there will be presented some new joint schemes which are perhaps leading the way to a new direction. There will be also consideration whether national schemes are still working well or should they perhaps be harmonized.

There are different types of support schemes and in general these can be divided into fiscal and non-cost-related ones. The Commission has listed some examples of the support

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evaluate if they indeed are necessary at all. Report from the Commission: Interim report of Sector inquiry on capacity mechanisms, SWD(2016) 119 final, 13 April 2016.

[94] Penttinen, Sirja-Leena, *'The Role of the Court of Justice of the European Union in the Energy Market Liberalization'* in Kim Talus (ed.), Research Handbook on International Energy Law (2014), p. 262.

[95] Articles 107-109 TFEU.

[96] Cameron, Peter, *'Competition in Energy Markets: Law and Regulation in the European Union'* 2nd ed. (Oxford: OUP, 2008), p. 515.

[97] Directive 2001/77/EC of the European Parliament and of the Council of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market. OJ L 283, 27.10.2001, pp. 33-40.

[98] Johnston, Angus and Block, Guy, *EU Energy Law* (Oxford 2012), p.330.

[99] Scholz, Lydia, 'The dialogue between free movement of goods and the national law of renewable energies', *Marius* nr. 446 p. 92.

schemes which have been implemented in the Member States, they can be divided in four main categories:

(i) quota obligations
(ii) tendering
(iii) feed-in tariffs and premia
(iv) fiscal incentives[100]

Whereas, the updated Renewable Energy Directive 2009/28/EC defines "support scheme" in its Article 2

(k): *"'support scheme' means any instrument, scheme or mechanism applied by a Member State or a group of Member States, that promotes the use of energy from renewable sources by reducing the cost of that energy, increasing the price at which it can be sold, or increasing, by means of a renewable energy obligation or otherwise, the volume of such energy purchased. This includes, but is not restricted to, investment aid, tax exemptions or reductions, tax refunds, renewable energy obligation support schemes including those using green certificates, and direct price support schemes including feed-in tariffs and premium payments;"*

(l): "*renewable energy obligation' means a national support scheme requiring energy producers to include a given proportion of energy from renewable sources in their production, requiring energy suppliers to include a given proportion of energy from renewable sources in their supply, or requiring energy consumers to include a given proportion of energy from renewable sources in their consumption. This includes schemes under which such requirements may be fulfilled by using green certificates".*

In practice these scheme systems are often combinations. Secondary legislation protects national support schemes promoting renewables at the market whereas primary EU law protects the free movement of goods.[101] Later on in this study there will be discussed how the support schemes affect to the trade and yet still on what grounds they may be justified, next however is defined more clearly what means environmental purpose and therefore environmental protection.

[100] Commission Staff Working Document: The support of electricity from renewable energy sources - Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources COM(2008) 19 final. SEC(2008) 0057 final, 23.1.2008, p.5.
[101] Penttinen, Sirja-Leena, *'The Role of the Court of Justice of the European Union in the Energy Market Liberalization'* in Kim Talus (ed.), Research Handbook on International Energy Law (2014), p. 262-263.

### 2.3 Defining environmental purpose

There is not a set priority between the EU's environmental policy and energy policy, but nevertheless one should keep in mind that Article 194 (1) TFEU states that "the Union's energy policy shall have regard to the need to preserve and improve the environment", whereas Article 191 (1) TFEU makes a reference to the objective of combating climate change.[102]

According to the Guidelines on State aid for environmental protection and energy 2014 – 2020 ('EEAG') 'environmental protection' means:

> *"any action designed to remedy or prevent damage to physical surroundings or natural resources by a beneficiary's own activities, to reduce the risk of such damage or to lead to more efficient use of natural resources, including energy-saving measures and the use of renewable sources of energy"*[103]

The Directive on the promotion of renewable energy was adopted on the basis of Article 192 (2) TFEU and 114 TFEU and therefore one could say that the (predominant) purpose of this Directive is the environmental protection. The CJEU has noted that; "[i]f a measure is designed to pursue a two-fold purpose or has a twofold component, and if one of these is identifiable as the main or predominant purpose or component, the act must be based on the legal basis required by that main or predominant purpose or component".[104] Therefore, the "rule of thumb" is meant to avoid misinterpretations of the legal basis and on the other hand its justification is to find "the center of gravity of the act"[105].[106]

One cannot deny that promoting environmental protection is highly important aim, but instead one could question both the purpose and the aim of renewable energy promotion when considering its legal basis. Based on the Court's reasoning, it could be argued that the predominant environmental purpose can be drawn from the Directive itself by the definition of its legal basis. Whereas from the other point view "[…] only a measure which simultaneously pursues several objectives that are *indissociably linked*, without one being

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[102]Opinion Advocate General *Mazák* in Case C-2/10 *Azienda Agro-Zootecnica Franchini sarl and Eolica di Altamura Srl v Regione Puglia* [2011] ECR I-6561, para. 47.
[103] Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1–55, para.19.
[104] Opinion of AG *Mengozzi* C-490/10 *Parliament v Council* [2012] para. 41.
[105] De Sadeleer, Nicolas, *EU Environmental Law and the Internal Market*, (OUP 2014), p. 151.
[106]Sveen, Thea, 'The interaction between Article 192 and 194 TFEU'. EU Renewable Energy Law- Legal challenges and new perspectives; *MarIus* nr. 466, pp.157-183, p. 165.

secondary and indirect in relation to the other, may be founded on the various corresponding legal bases".[107] The current case law also seems rather strongly act as a necessary tool and interpretation of the secondary legislation while underlining the importance of the environmental protection and its predominant purpose or component of the renewable energies[108].[109]

As already discussed above, the legal basis of the renewable energy Directive is drawn from Article 192 (2) FTEU and not Article 194 (2) TFEU. At first glance one could say that, there is not really that great difference between these two provisions. However, when examining them a bit more closely, one can find some key elements that differs them from each other and enhance the predominant environmental purpose in the promotion of renewable energy. It seems that it is not by accident that Article 192 (2) TFEU was chosen to be the legal basis, but rather a strategic choice to do so. Environmental issues and energy are deniably becoming more intertwined. Therefore, the single legal basis of the Directive actually underlines that, even if the Directive has two objectives, environment and energy, in the end energy is the main one and environment is more the incidental one.[110] The Directive based on the single legal basis, Article 194 (2) TFEU, emphasis that the energy provision is sufficient in order to cover the main or pre-dominant aim or component of the secondary legislation in that case concerned[111].[112]

According to Advocate General *Mengozzi* Article 194 TFEU is actually a; "[p]rovision laid down specifically to regulate European Union policy in the energy sector, and constitutes the general reference point for that policy". In a greater context, "[t]he protection of the environment does not require a purely national understanding but has a European dynamic, in particular when faced with climate change mitigation".[113] Therefore, one could state that it is more than reasonable to say that protecting environment and subsequent legal framework around it, is actually better off within an overreaching common EU logic. Then

[107]Opinion of AG Mengozzi C-490/10 *Parliament v Council* [2012] ECR 00000 para. 42.
[108] C-573/12 *Ålands Vindkraft AB v Energimyndigheten* [2014] ECLI:EU:C:2014:2037 and Joined Cases C-204 & 208/12 *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elekticiteits – en Gasmarkt* [2014] ECLI:EU:C:2014:2192.
[109] Sveen, Thea, 'The interaction between Article 192 and 194 TFEU'. EU Renewable Energy Law- Legal challenges and new perspectives; *MarIus* nr. 466, pp.157-183, p.165.
[110] As an example of this see, Directive 2012/27/EU of the European Parliament and of the Council of 25 October 2012 on energy efficiency, amending Directives 2009/125/EC and 2010/30/EU and repealing Directives 2004/8/EC, OJ L 315, 14.11.2012, p.1-57 (Energy Efficiency Directive).
[111] C-490/10 *Parliament v Council* [2012] ECR 00000 para. 45.
[112]Thea Sveen, The interaction between Article 192 and 194 TFEU. EU Renewable Energy Law- Legal challenges and new perspectives; *MarIus* nr. 466, pp.157-183, p. 167.
[113] Opinion of AG Mengozzi in Case C-490/10 *Parliament v Council* [2012] ECR 00000, para. 23.

the legislator may act without directly applying the energy provision since the measures are only incidentally interacting with Article 194 TFEU.[114] Besides, the directive on the promotion of renewable energy source notes that; "[t]he coherence between the objectives of this Directive and the Community's *other environmental legislation* should be ensured".[115] The preamble's wording does indeed strengthen the idea of renewable energy promotion to be an integrated part of the EU's overall environmental legislation. One could question however, if renewable energy promotion is therefore properly positioned in the primary EU law legal landscape.[116]

The CJEU's case law has highlighted that the environmental protection with its predominant purpose enables the specific derogations concerning promotion of renewables in the name of environmental protection.[117] In a light of derogations related to the energy provision itself and the environmental concerns, a predominant environmental purpose is therefore strengthened within this provision and also in a broader EU's internal market context.[118]

*Johnston* and *van der Marel* explained this quite well by stating that; "[t]he preservation and improvement of the environment is, together with the functioning of the internal market, one of the two aims of Article 194 TFEU. This means that a derogating measure which does not achieve a higher level of environmental protection is contrary to both of the objectives of Article 194 TFEU, since by definition a derogating measure will also be an obstacle to the functioning of the internal market".[119]

Within the context of the interpretation of both primary, whereas also secondary legislation, the environmental protection as an overriding justification has encapsulated

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[114] Opinion AG Bot in Joined Cases C-204 & 208/12 *Essent Belgium NV v Vlaame Reguleringsinstantie voor de Elekticiteits – en Gasmarkt* [2014] ECLI:EU:C:2014:2192, para. 110.
[115] Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140/16, 5.9.2009, recital 44. Emphasis added.
[116] Sveen, Thea, 'The interaction between Article 192 and 194 TFEU'. EU Renewable Energy Law- Legal challenges and new perspectives; *MarIus* nr. 466, pp.157-183, p. 168-169.
[117] C-573/12 *Ålands Vindkraft AB v Energimyndigheten* [2014] ECLI:EU:C:2014:2037 and Joined Cases C-204 & 208/12 *Essent Belgium NV v Vlaame Reguleringsinstantie voor de Elekticiteits – en Gasmarkt* [2014] ECLI:EU:C:2014:2192.
[118] Sveen, Thea, 'The interaction between Article 192 and 194 TFEU'. EU Renewable Energy Law- Legal challenges and new perspectives; *MarIus* nr. 466, pp.157-183, p. 168.
[119] Johnston, Angus and van der Marel, Eva, 'Ad Lucem? Interpreting the New EU Energy Provision, and in particular the Meaning of Article 194 (2) TFEU', *European Energy and Environmental Law Review* (2013), p. 189.

within the Treaties.[120] Naturally, the interpretation of the EU law cannot be based merely on wordings of the provisions, but one should keep in mind a larger teleological perspective.[121] However, when looking at the Treaty itself it leaves the promotion of renewable energy in the middle of energy and environmental provisions through Article 194 (2) and 192 (2)(c) TFEU. Thus, there is left a space for a legal uncertainty when considering the competences between the EU and Member States in this matter. One could possibly argue the Article 192 (2) TFEU was chosen intently in order to enable the CJEU to favor exhaustive harmonization whenever it is possible without conflict Article 194 (2) TFEU. This approach enables a more consistent argumentation when considering the possible derogations of the national support schemes' territorial restrictions on the basis of environmental protection to be regarded as a common European interest.[122]

Also the European Court of Human Rights (ECtHR) has emphasized the importance of the protection of the environment and individuals' health. The ECtHR's "green" case law[123] requires the state parties to respect rights and freedoms while guaranteeing their free exercise with private and state actors. Therefore, can be said that the states have the positive obligation to lay down substantive environmental quality standards on private actors in order to make sure that they do not interfere individuals´ health, private life or property.[124]

Based on case law of the ECtHR, can be said that states are allowed rather large margin of appreciation to pursue important environmental goals, if only they are able to balance the relationship between the general interests of the community and the protection of the fundamental rights of an individual.[125]

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[120] See Article 11 TFEU, Article 21 TFEU whereas also Article 37 of the *Charter of Fundamental Rights of the European Union.* Official Journal of the European Union, 2010/C 83/02, 30.3.2010. Morgera, Elisa and Marín Durán, Gracia, 'Commentary to Article 37: Environmental Protection', in Steve Peers, Tamara Hervey, Jeff Kenner and Angela Ward, *The EU Charter of Fundamental Rights: A Commentary*, (Hart Publishing 2014) p. 983-1003. See also Scholz, Lydia, 'The dialogue between free movement of goods and the national law of renewable energies' *MarIus* nr. 466, pp. 89-109, p. 102.

[121] The Court has noted that it is not just the wordings of the relevant objectives, but also their context and objectives in secondary legislation that should be taken into account, see for example; C-292/82 *Merck* [1983] ECR3781, para.12; C-223/98 *Adidas* [1999] ECR I-7081, para.23

[122] Sveen, Thea, 'The interaction between Article 192 and 194 TFEU. EU Renewable Energy Law- Legal challenges and new perspectives; *MarIus* nr. 466, pp.157-183, p. 170.

[123] *Guerra v Italy* (no. 14967/89), judgment of 19 February 1998. *Powell and Rayner v. the United Kingdom*, judgment of 21 February 1990, Series A, No. 172. *López Ostra v Spain*, judgment of 9 December 1994, Series A, No. 303 – C.

[124]Beyerlin Ulrich, Marauhn Thilo, *International Environmental Law* (Oxford 2011). p. 401.

[125] *Katsoulis and others v Greece* 2005, No 66742/01. See also;

Next chapter moves on to the free movement of goods principle and examines more specifically on what grounds the intervention on free movement can be justified.

http://www.unep.org/environmentalgovernance/Portals/8/documents/Events/HumanRightsEnvironmentRev.pdf, (last accessed 9.1.2017).

# 3 FREE MOVEMENT OF GOODS

## 3.1 Legal principle anchored in the EU primary law

### *3.1.1 General remarks*

The principle of free movement of goods[126] has been in the hearth of creating EU's internal market. It is one of the so-called four fundamental freedoms established by the EC Treaty. Articles 28-30 of the EC Treaty created the content and scope of the principle by prohibiting unjustified restrictions on cross-border trade within the EU. Following the entry of Lisbon Treaty, the free movement of goods provisions have remained unchanged, but are now numbered as Articles 34-36 TFEU. However, the principle of free movement of goods is not an absolute value. For certain specific overriding political aims, such as environmental protection, it may be necessary to use some restrictions or even prohibitions regardless if they would hamper free trade. In past years "greening" the economy has taken in place and therefore it does not come as a surprise that certain grounds for justification are viewed differently that what they have been before. This third chapter concentrates on the principle of cross-border free movement of goods and what kind of an affect the national measures may have on trade. The last part of this chapter concentrates on the intervention of free movement of goods and on what basis it may be justified.

In order to create single market, the EU has worked to limit all kind of competitive distortions that may arise in the common market.[127] There is a list of rules regarding for example among others the state aid, tax exemptions, subsidies and payment exemptions[128].[129] At the beginning the Commission seemed rather careful and sometimes

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[126] Based on the EU case law, energy is a *"good"*, despite that it does not fit into the traditional perception of tangible object. Therefore, energy products are covered by the free movement of goods Treaty provisions at the primary EU law level. See C-6/64 *Costa v ENEL* [1964] ECR 585 for the first affirmation of this position. See also C-393/92 *Almelo* [1994] ECR I-1477; C-157/94 *Commission v Netherlands* [1997] ECR I-5699; C-159/94 *Commission v Italy* [1997] ECR I-5793; C-158/94 *Commission v France* [1997] ECR I-5819.

[127] Cameron, Peter, *Competition in Energy Markets: Law and Regulation in the European Union*, 2nd ed. (OUP, 2008), p.33.

[128] Ehlermann, Claus-Dieter and Goyette, Martin, 'The Interface between EU State Aid Control and the WTO Disciplines on Subsidies', *4 European State Aid Quaterly* (2006), p.695.

[129] Behn, Daniel, 'Methods for Allocating Allowances Under the EU Emissions Trading Scheme', *EU energy Law and policy Issues. ELRF Collection* vol. 3. Bram Delvaux, Michaël Hunt, Kim Talus (Eds.). (Cambridge 2012), p. 245.

even unwilling to attempt to apply the EU competition rules at the energy sector.[130] However, in the 1990s the Commission brought two different sets of infringement proceedings before the Court. The Commission claimed that the exclusive rights the national actors were enjoying were actually contrary to Treaty provisions concerning the free movement of goods and freedom of establishment and therefore the public service obligations under Article 106 (2) TFEU could not justify these rights.[131] Since then, competition law provisions have been in a key role in the process of opening up the markets and nowadays it has become more frequent whereas also more far-reaching.[132] However, as it will be presented later on in this study, recently the CJEU has received cases for preliminary rulings in which the emphasis have been on internal market law instead of competition law.[133]

These Treaty Articles 34-36 TFEU do not apply when the free movement of a product in question is fully harmonized by a more specific EU legislation. In a case where secondary legislation is considered to be relevant, any national measure related to it, must be envisaged with the harmonizing provisions, by means of directives or regulations, instead of those of the Treaty.[134] Harmonizing legislation is substantiating the free movement of goods principle by creating actual rights and duties that a product in question needs to meet instead of just broad principles enshrined in the Treaty. In case harmonizing legislation cannot be identified, Articles 34-36 TFEU should be relied on.

### *3.1.2 The scope of Article 34 TFEU*

Article 34 TFEU[135] according to its wording applies to the trade obstacles between Member States, therefore one should note that a cross-border element needs to be there in order to provoke this provision. One could perhaps describe Article 34 TFEU as a defense right which may be invoked against a national measure that is creating unjustified

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[130] As presented at the beginning of this study, the energy sector was characterized by the state monopolies and national companies closely related to the government controlling the energy market, for a comprehensive overview, see Talus, Kim, *EU Energy Law and Policy*. 1st edn. (OUP 2013), p.269-286.

[131] C-157/94 *Commission v Netherlands* [1997] ECR I-5699, C-159/94 *Commission v Italy* [1997] ECR I-5793; C-158/94 *Commission v France* [1997] ECR I-5819. For more on this issue, see Penttinen, Sirja-Leena, *'The Role of the Court of Justice of the European Union in the Energy Market Liberalization'* in Kim Talus (ed.), Research Handbook on International Energy Law (2014), p. 251-253.

[132] Johnston, Angus and Block, Guy, *EU Energy Law* (Oxford 2012), p.7.

[133] See as presented in this study; C-573/12 *Ålands Vindkraft* [2014] ECLI:EU:C:2014:2037 and C-204 to C-208/12 *Essent Belgium* [2014] ECLI:EU:C:2014:2192.

[134] C-309/02 *Radlberger Getränkegesellschaft and S. Spitz* [2004] ECR I-11763, para. 53.

[135] Article 34 TFEU: "quantitative restrictions on imports and all measures having equivalent effect, shall be prohibited between Member States".

obstacles on cross-border trade. Therefore, infringements of Article 34 TFEU seem to be related to a state activity and the scope of the Article consists mainly of binding provisions of Member States' legislation; however this does not mean that also non-binding measures could not be breaching the Article.[136]

In the infamous judgment of *Dassonville*[137], the Court stated that all the trading rules laid down by Member States which are capable of hindering, directly or indirectly, actually, or potentially, intra-Community trade are to be considered as measures having an effect equivalent to quantitative restrictions.[138] In the *Dassonville* case, the Court highlighted that the most important element when evaluating whether a national measure at hand is caught under 34 TFEU is its effect, and therefore the aspect of discriminatory of the measure is no longer a deciding fact for the Article 34 TFEU.

With the intention of deepening the EU's internal market, the removal of trade barriers was considered not to be enough. Even though, the Member States do not directly discriminate the products that are from other Member States, sometimes they do treat them differently compared to domestic ones, in some cases even unfavorably.[139] The Court stated in the case of *Cassis de Dijon*[140], that any product legally manufactured and marketed in a Member State in accordance with its fair and traditional rules, and with the manufacturing process of that country, must be allowed onto the markets of any other Member State. In the absence of harmonization, this is the defining principle of mutual recognition and therefore even if there would not be EU harmonization, in other words secondary legislation, Member States are obliged to allow goods legally produced and marketed in other Member State to freely circulate and to be sold on their markets.[141] So-called mandatory requirement that were laid down by the *Cassis* case will be examined later on in this study when talking about intervention in the free movement of goods.

It seems clear to the Court after *Cassis*, that there might be differences between the national regulations and this could inhibit the trade between the Member States and

[136] C-249/81 *Commission v Ireland* (Buy Irish) [1982] ECR 4005.
[137] C-8/74 *Dassonville* [1974] ECR 837.
[138] C-8/74 *Procureur du Roi v Benoît and Gustave Dassonville*[1974] ECR- I-00837, para. 5 and C-320/03 *Commission of the European Communities v Republic of Austria* 2005 ECR I-09871, paras. 63 and 67.
[139] Penttinen, Sirja-Leena, *'Ålands Vindkraft AB v Energimyndigheten - The Free Movement Law Perspective'*, vol. 13 - issue 3, OGEL (2015), p. 14, www.ogel.org.
[140] C-120/78 *Cassis de Dijon* [1979] ECR 649.
[141] C-120/78 *Cassis de Dijon* [1979] ECR 649.

therefore the Court confirmed that Article 34 TFEU could also apply to national measures which are affecting equally to domestic and imported goods. In a case like this, Member State could refer not only to Article 36 TFEU, but also to the mandatory requirements which were firstly established in this judgment. Subsequently, after *Dassonville* and *Cassis*, there is no need a national measure to have any discriminatory element against imported goods in it in order to be caught under Article 34 TFEU, but it also covers those measures which seem to be applying equally to both domestic and imported goods, but are in practice more burdensome for the imported ones. These measures are sometimes referred to as 'indistinctly applicable' rules[142].

Article 34 TFEU covers non-tariff trade barriers, however all customs duties and charges having equivalent effect are prohibited under Article 30 TFEU. As a general rule it can be said that, any charge connected to the act of crossing border- regardless its aim, amount, or discriminatory or protectionist character- it will be considered as a charge having equivalent effect.[143] If however, the charge is related to a general system of internal dues which are applied systematically and have the same criteria for domestic and imported/exported products alike, the charge is not considered to be a charge having equivalents effect to a customs duty.[144]

Article 110 TFEU, on the other hand, contains the provisions on the abolition of customs duties and charges having equivalent effect. It aims to ensure the free movement of goods within the EU by eliminating all forms of protectionist measures which may occur as a result from the application of internal taxation that discriminates against the imported products.[145] In relation to Article 34 TFEU, Article 110 TFEU is considered as *lex specialis*, which means in other words that cases that are covered by Article 110 TFEU exclude the application of Article 34 TFEU.[146] The first part of the Article 110 TFEU is being infringed if the tax charged is calculated on different criteria on an imported product than what it is for domestic one and therefore, only in certain cases, leading to higher taxation of the imported product. The second part of the Article 110 TFEU is concentrated on the national tax provisions that are seeking to indirectly protect domestic products by

[142] C-110/05 *Commission v Italy* [2009] ECR I-519, para. 35.
[143] See for example cases: Joined cases C-441/98 and C-442/98 *Michaïlidis* [2000] ECR I-7145, para 15 and C-389/00 *Commission v Germany* [2003] ECR I-2001.
[144] See C-389/00 *Commission v Germany* [2003] ECR I-2001.
[145] Joined Cases C-290/05 and C-333/05 *Nádasdi and Németh* [2006] ECR I-10115, para. 45.
[146] C-134/07 *Kawala* [2007] ECR I-10703.

imposing unequal tax ratings to foreign goods which may be similar but not the same kind as the domestic ones, but yet still competing with them.[147]

Since there have not been a concept of prohibition of charges having an effect equivalent to that of customs duties: Articles 28 (1) and 30 TFEU and the Court's case law have played an important role of interpreting the prohibition. According to the Court, any charge, no matter how it is called or applied, "[w]hich, if imposed upon a product imported from a Member State to the exclusion of a similar domestic product has, by altering its price, the same effect upon the free movement of products as a customs duty" may be regarded as a charge which have an equivalent effect. The nature or the form of the charge does not affect either.[148]

Almost 20 years passed since *Dassonville*[149], when the Court finally found it necessary to set out some limitations to the scope of the term "measures having equivalent effect" as stated in Article 34 TFEU. In the Case of *Keck and Mithouard*, the Court stated that: "[--] in view of the increasing tendency of traders to invoke Article [34] of the Treaty as a means of challenging any rules whose effect is to limit their commercial freedom even where such rules are not aimed at products from other Member States, the Court considers it necessary to re-examine and clarify its case-law on this matter". In the case the Court referred to *Cassis de Dijon* noting that: "[r]ules that lay down requirements to be met by such goods (--) constitute measures of equivalent effect prohibited by Article 34".[150] Continuing with a statement according to which "[b]y contrast, contrary to what has previously been decided, the application to products from other Member States of national provision restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment"[151].

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[147] C- 170/78 *Commission v United Kingdom* [1983] ECR 2265.
[148] Joined Cases C-2/ 62 and C-3/63 *Commission of the European Economic Community v Grand Duchy of Luxembourg and Kingdom of Belgium* [1962] ECR Special Edition 00425 and C-232/78 *Commission des Communautés européennes contre République français* [1978] ECR -02729.
[149] It seems that the reasoning of *Keck and Mithouard* Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097 is already present in the preceding cases such as C-155/80 *Oebel* [1981] ECR 1993 and 148/85 *Forest* [1986] ECR 3449. Contrary to this reasoning see for example (pre-*Keck and Mithouard*) Joined Cases 60/84 and 61/84 *Cinéthèque* [1985] ECR 2605 and Case C-145/88 *Torfaen* [1989] ECR 3851. Applying the test was difficult in *Torfaen* and evidently also in other case law. For an outline of the case law concerning Article 28 EC before the *Keck and Mithouard* judgment see the opinion of Advocate General Jacobs in Case C-412/93 *Leclerc-Siplec* [1995] ECR I-179, at I-182, paras. 23 to 33.
[150] Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, para.15.
[151] Joined Cases C-267/91 and C-268/91 *Keck and Mithouard* [1993] ECR I-6097, para.16.

Therefore, the rules that are setting down requirements to be met by the products continue to be treated under the Cassis-formula and are subsequently considered to fall *per se* within the scope of Article 34 TFEU, whether or not, they also introduce discrimination on the basis of the origin of the good. However, selling arrangement, by contrast fall with the scope of the Article 34 TFEU only if it can be proved that the arrangements introduce discrimination on the basis of the origin of a product.[152] In other words, this means all relevant traders who are operating within the national territory are affected in the same manner, both in law and fact, including the marketing of domestic products and products from other Member States.[153]

The Court finally in the case of *Commission v Italy*[154] stated that the case law concerning Article 34 TFEU highlights the obligations to respect three key principles:

(a) the principle of non-discrimination;
(b) the principle of mutual recognition; and
(c) the principle of ensuring free access of Community products to national markets.

In the paragraph 35 of the judgment it repeated the classic explanation as regards *Cassis* and in the next paragraph as regards *Keck and Mithouard*. According to paragraph 37: "[c]onsequently, measures adopted by a Member State the object or effect of which is to treat products coming from other Member States less favorably are to be regarded as measures having equivalent effect to quantitative restrictions on imports within the meaning of Article [34 TFEU], as are the measures referred to in paragraph 35 of the present judgment. *Any other measure which hinders access of products originating in other Member States to the market of a Member State* is also covered by that concept" (emphasis added).

In the case of *Mickelsson & Roos*[155] the question was whether Articles 34 and 36 TFEU precluded Swedish rules on the use of personal watercraft. The Court used new market

[152] C-412/93 *Leclerc-Siplec* [1995] ECR I-179, para. 22, and C-6/98 *ARD* [1999] ECR I-7599, para.46.
[153] Joined Cases C-267/91 and C-268/91 *Criminal proceedings against Bernard Keck and Daniel Mithouard* [1993] ECR I-06097, "[C]ontrary to what has been previously decided, the application to products from other Member States of national provisions restricting or prohibiting certain selling arrangements is not such as to hinder directly or indirectly actually or potentially trade between Member States within the meaning of the Dassonville judgment(…)provided that those provisions apply to all affected traders operating within the national territory and provided that they affect in the same manner, in law and in fact, the marketing of domestic products and of those from other Member States", par.16.
[154] C-110/05 *Commission v Italy* [2009] ECR I-519.

access test and stated that: "[a]ny other measure which hinders access to products originating in other Member States to the market of a Member State is also covered by the concept of measures having equivalent effect".[156] Therefore one could say that the prohibition in question had the effect of virtually blocking the market access. In the paragraph 40 the Court also held that the national regulations as such in the case might be justified by the aim of environmental protection, as long as certain conditions[157] are met. Although, one could ask whether the market access test is only a new popular slogan adding nothing new to the law of free movement[158], or whether it could truly add something new to the principle of free movement.[159] It is also worth of noting how the Court used the words such as "prevent" and "hinder" in order to make it clear that the national measure is not treating equally the national products and imports.[160]

### *3.1.3 Article 35 TFEU Export barriers*

Even though the wording of Article 34 TFEU and 35 TFEU is very similar, there is a distinctive difference between these two; Article 35 TFEU basically applies only to measures that are discriminating against exported goods.[161] According to the Court, Article 35 TFEU; "[c]oncerns national measures which have as their specific object or effect the restriction of patterns of exports and thereby the establishment of a difference between the domestic trade of a Member State and its export trade in such a way as to provide a particular advantage for national production or for the domestic market of the state in question at the expense of the production or of the trade of other Member States".[162]

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[155] C-142/05 *Mickelsson & Roos* [2009] ECR I-4273, para. 24.
[156] See also C-110/05 *Commission v Italy* [2009] ECR I-519 and C-265/06 *Commission v Portugal* [2008] ECR I-2245.
[157] C-142/05 *Mickelsson & Roos* [2009] ECR I-4273. According to para 39; "regulations such as those at issue in the main proceedings may, in principle, be regarded as proportionate provided that, first, the competent national authorities are required to adopt such implementing measures, secondly those authorities have actually made use of the powers conferred on them in that regard and designated the waters which satisfy the conditions provided for by the national regulations and, lastly, such measures have been adopted within a reasonable period after the entry into force of those regulations".
[158] Snell, Jukka, 'The Notion of Market Access: A Concept or a Slogan?', 2 (47) *Common Market Law Review* (2010), pp. 437-472.
[159] Craig, Paul & de Búrca, Gráinne, *EU Law, Text, Cases and Materials* (5th edition, Oxford University Press, 2011), pp. 662-664.
[160] Snell, Jukka, 'The Notion of Market Access: A Concept or a Slogan?', 2 (47) *Common Market Law Review* (2010), pp 448-449. The Court may give certain meaning for things and emphasize certain aspects. The Court could add the persuasiveness of its reasoning by choosing its wording in certain way, see more; Perelman, Chaim, *Retoriikan valtakunta* (Tampere 1996).
[161] Article 35 TFEU: "quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States".
[162] C-15/79 *Groenveld* [1979] ECR 3409; see also C-12/02 *Marco Grilli* [2003] ECR I-11585, para 41.

Article 35 TFEU is being interpreted narrowly, because in the case of imports non-discriminatory measures could cause a dual burden on imports since they have to firstly comply with the rules in their country of origin and then again in the country where they are being imported. Therefore such measures should be rightly caught by the EU law in order to protect the internal market. However, this is not the case for the exporters who merely need to follow the domestic market rules. If the scope of the Article 35 TFEU would be very wide it would actually laid down restrictions which have no bearing on trade between the Member States. Article 35 TFEU is there to catch trade barriers that have an actual and specific effect on exports and that may be creating a situation in which trade within a Member State and exports is treated differently.[163]

As stated earlier, according to Article 34, *"quantitative restrictions on imports and all measures having equivalent effect, shall be prohibited between Member States"*, whereas 35 TFEU states that *"quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between Member States"*. Free movement of energy within the internal market is also based on these Articles. However, as one can see, these two articles are rather unclearly worded and therefore Court's active interpretation has been needed over the decades[164].[165]

The principle of *de minimis* is not in relation to the free movement of goods articles, and in addition according to the case law; a national measure does not stay outside of the scope of the prohibition in Articles 34-35 TFEU only because the hindrance it is creating is slight and it would be possible for the products to be marketed in different way.[166] Therefore a national measure can be constituted as a measure having equivalent effect even if:

(i) it is of relatively minor economic significance;

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[163] C-205/07 *Gysbrechts and Santurel Inter* [2008] ECR I-9947.

[164]Trstenjak, Verica and Beysen, Erwin, 'The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the case-law of the CJEU', 3 (38) *European Law Review* (2013), p. 293. There have been many energy related cases heard by the CJEU related to the free movement provisions contained in EU treaties such as; C-72/83, *Campus Oil v Minister for Industry* [1984] ECR 2727 (Ireland); C-347/88 *Commission v Greece* [1990] ECR I 4747; C-157/94 *Commission v Netherlands* [1997] ECR I-5699; C-158/94 *Commission v Italy* [1997] ECR I-5789; C-159/94 *Commission v France* [1997] ECR I-5815; C-160/94 *Commission v Spain* [1997] ECR I-5851; C-379/98 PreussenElektra, [2001] ECR 2099.

[165] Penttinen, Sirja-Leena, *'Ålands Vindkraft AB v Energimyndigheten - The Free Movement Law Perspective'*, vol. 13 - issue 3, OGEL (2015), p.14, www.ogel.org.

[166] C-269/83 *Commission v France* [1985] ECR 837; C-103/84 *Commission v Italy* [1986] ECR 1759.

(ii) it is only applicable on a very limited geographical part of the national territory;[167]

(iii) it only affects a limited number of imports/exports or a limited number of economic operators.

Some national rules have been considered to be outside the scope of Article 34 TFEU when their restrictive effect on intra-EU trade is too uncertain and indirect.[168] However, this is not the same as *de minimis* principle.

Currently, when evaluating whether national measures are hindering the trade between Member States cases are evaluated in the light of discrimination, so it will be left to be seen, if the new market access approach will find its place in free movement law or not.[169] There will be more consideration about the matter, and especially in the light of environmental protection later on in this study. Next part however, concentrates on the justification for barriers to trade.

### 3.2 Intervention in the free movement of goods

*3.2.1 Justifying (directly) discriminatory barriers to trade: Article 36 TFEU*

Article 36 TFEU sets down the exceptions to the prohibition of measures having an effect equivalent to that of quantitative restrictions. According to Article 36 TFEU:

> *"The provisions of Articles 34 and 35 shall not preclude prohibitions or restrictions on imports, exports or goods in transit justified on grounds of public morality, public policy or public security; the protection of health and life of humans, animals or plants; the protection of national treasures possessing artistic, historic or archaeological value; or the protection of industrial and commercial property. Such prohibitions or restrictions shall not, however, constitute a means of arbitrary discrimination or a disguised restriction on trade between Member States."*

In other words, Article 36 TFEU lists the defenses that Member States could use in order to justify national measures that are impeding cross-border trade. Article 36 TFEU gives Member States the right to take measures having an effect equivalent to that of quantitative

[167] C-67/97 *Bluhme* [1998] ECR I-8033.
[168] C-379/92 *Peralta* [1994] ECR I-3453, see also the case C-20/03 *Burmanjer and Others* [2005] ECR I-4133 in which the Court held that the national rules in question had an effect over the marketing of products from other Member States was too insignificant and uncertain to be considered as being such as to hinder or otherwise interfere the trade between the Member States.
[169] Penttinen, Sirja-Leena, *'Ålands Vindkraft AB v Energimyndigheten - The Free Movement Law Perspective'*, vol. 13 - issue 3, OGEL (2015), p. 14-15, www.ogel.org.

restrictions, when these measures are justified by general, non-economic consideration[170] such as public security,[171] public morality,[172] public policy[173] or public health[174]. Court's case law additionally provides for so-called mandatory requirements, for example environmental protection, based on what a Member State could also rely on when defending a national measure, these will be examined a bit more closely on the next part of this chapter.

Exceptions to the general principle must be however interpreted strictly, and these national measures are not allowed to lead to arbitrary discrimination or to be disguised restrictions on trade between the Member States even though they would justified under Article 36 TFEU. The second part of the Article is there in order to avoid abuse on the part of Member States. According to the Court; "[t]he function of the second sentence of Article [36] is to prevent restrictions on trade based on the grounds mentioned in the first sentence from being diverted from their proper purpose and used in such a way as to create discrimination in respect of goods originating in other Member States or indirectly to protect certain national products"[175], in other words setting up national protectionist measures.

One should also note, that the exceptions are no longer justified, if the EU has draft legislation covering that area.[176] In case of partial harmonization, the actual harmonizing legislation quite often gives the authorization for Member States to maintain or stricter measures as long as they are compatible with the Treaty. One the other hand, in case there is no EU-level harmonization Member States are allowed to decide their own levels of protection as long as the measures adopted are proportionate. In such cases it will be left for the Court to evaluate the provisions in question if needed.

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[170] C-120/95 *Decker* [1998] ECR I-1831.
[171] C-/83 *Campus Oil* [1984] ECR 2727.
[172] Compare the cases of C-34/79 *Regina v Maurice Donald Henn and John Frederick Ernest Darby* [1979] ECR 295 and C-121/85 *Conegate Limited v HM Customs & Excise* [1986] ECR 114.
[173] Difficult to establish as a ground itself, see for example C-231/83 *Henri Cullet and Chambre syndicale des réparateurs automobiles et détaillants de produits pétroliers v Centre Leclerc à Toulouse and Centre Leclerc à Saint-Orens-de-Gameville* [1985] ECR 29.
[174] Public health risk must be a real health risk, see for example C-40/82 *Commission of the European Communities v United Kingdom of Great Britain and Northern Ireland* [1984] ECR-00283.
[175] See cases; C-34/79 *Henn and Darby* [1979] ECR 3795, para.21, as well as Joined Cases C-1/90 and C-176/90 *Aragonesa de Publicidad Exterior and Publivía* [1991] ECR I-4151, para 20.
[176] See cases C-473/98 *Toolex* [2000] ECR I-5681 and C-5/77 *Tedeschi v Denkavit* [1977] ECR 1555.

In addition, the measures must have a direct effect on the public interest that it is protecting and they have to be in accordance with the proportionality principle. Burden of proof rests with a Member State that is trying to rely on this provision.[177] There is also a proportionality test, as stated in the case of *Campus Oil*; "[A]rticle 36, as an exception to a fundamental principle of the Treaty must be interpreted in such a way that its scope is not extended any further than is necessary for the protection of the interests which is intended to secure and the measures taken pursuant to that Article must not create obstacles which are disproportionate to those objectives".[178]

When considering permissible limitations, one has to take a look at the case law. Measures having an effect equivalent to quantitative restrictions are, according to the Court's previous case law: "[t]rading rules enacted by Member States which are capable of hindering directly or indirectly, actually or potentially, intra-Community trade".[179] The Court has interpreted Article 36 TFEU narrowly, in its previous case law it has held that the enumeration of reasons to justify trade limitations between Member States is exhaustive[180], and therefore it has not extended these reasons to cover environmental protection. However, the Court has also held that certain environmental measures may be within the scope of Article 36 TFEU in case where they are aiming to protect health or a life of humans, plants or animals[181].[182]

*3.2.2 Justification of the intervention under Cassis-formula*

As mentioned before, already in the case of *Cassis de Dijon*, the Court introduced the so-called mandatory requirements.[183] According to which, in the absence of the EU harmonization measures, Member States' reasonable trade rules may be accepted in certain circumstances. Therefore, a mandatory requirement could prevent free movement of goods and constituted as measures of equivalent effect prohibited by Article 34 TFEU. According

[177] C-251/78 *Denkavit Futtermittel* [1979] ECR 3369.
[178] C-72/83 *Campus Oil* [1984] ECR 2727, para.37.
[179] C- 8/74 *Dassonville* [1974] ECR 837.
[180] C-113/89 *Commission v Ireland* [1981] ECR, 1625, 1638, C-95/81 *Commission v Italy* [1982] ECR, 2187, 2202.
[181] C-54/85 *Mirepoix* [1986] ECR 1067 and C-125/88 *Nijman* [1989] ECR I-03533.
[182] Gao, Zhiguo, *Environmental Regulation of Oil and Gas* (Kluwer Law International 1998), p.202.
[183] C-120/78 *Cassis de Dijon* [1979] ECR 649. In the case, the CJEU held that a national provision is a measure having an effect to a quantitative restriction on imports and pointed out that: "obstacles to movement within the Community resulting from disparities between the national laws relating to the marketing of the product in question must be accepted in so far as those provisions may be recognized as being necessary in order to satisfy mandatory requirements relating in particular to the Effectiveness of fiscal supervision, Protection of public health Fairness of commercial transactions and Defense of the customer".

to the judgment these mandatory requirements are related in particular to the protection of public health, the effectiveness of fiscal supervision, the defense of the consumer and the fairness of commercial transactions. One should note that, the mandatory requirements are different than those on public interest grounds that are stated in Article 36 TFEU. They are similar, but not identical. The list of mandatory requirements is not exhaustive: it can be, and has been, added by the CJEU,[184] for example the environmental protection has been added to it over the years. On the other hand, the list based on Article 36 TFEU is exhaustive, since it touches the very core of the EU law by allowing the Member States to justify only those trade rules that are considered to be directly discriminatory, naturally under the principle of proportionality.[185]

Previously, the CJEU has separated these two categories for justification according to which the Member States are not allowed to justify discriminatory measures based on any other than those listed in Article 36 TFEU. Mandatory requirements, as they were created by the Court in the Cassis case, could be invoked only to justify the indistinctly applicable rules, and therefore they could not be theoretically used to justify discriminatory measures. However, the Court seems to be changing its line of judgments slowly by the time while applying a wider framework for the justification of public interest. Even though the environmental protection is not expressly listed in Article 36 TFEU, it has been recognized by the Court as constituting an overriding mandatory requirement. The Court has taken the view that: '[t]he protection of the environment is "one of the Community's essential objectives", which may as such justify certain limitations of the principle of free movement of goods'.[186] Especially this wider framework approach can be seen in the cases, where the public interest objective has been environmental protection recognized as a mandatory requirement by the Court.[187]

Although, one should keep in mind that sometimes it may be rather difficult to determinate whether a national measure at hand involves direct or indirect discrimination. In this case, the Court may apply one or the other justification category without stating clearly, if the national measure has directly discriminatory features or not. Although, it can be seen that

[184] Craig, Paul and de Burca, Gráinne, *EU Law Text, Cases and Materials* (2003), p.638.
[185] Craig, Paul & de Búrca Gráinne, *EU Law, Text, Cases and Materials* (5th edition, Oxford University Press, 2011), p. 677.
[186] C-302/86 *Commission v Denmark* [1988] ECR 4607, para 8.
[187] C-240/83 *ADBHU* [1985] ECR 531; C-302/86 *Commission v Denmark* [1988] ECR4604, para.9; C-213/96 *Outokumpu* [1998] ECR I-1777, para.32; C-320/03 *Commission v Austria* [2005] ECR I-9871, para. 72.

the Court's case law does not contain a specific definition of "direct discrimination".[188] The Court rather seems to be referring to the principle of equal treatment as a general principle of the EU law according to which; similar situations must not be treated differently whereas different situations may not be treated the same way, unless the treatment at hand is objectively justified.[189] Especially in the previous case law, a measure was usually tried to be classified to be either directly or indirectly discriminative.[190]

Lately however, the Court has remained rather quiet about the nature of such trade affecting measures while avoiding the need to categorize the measures at any way. Therefore, there has not been the need for the Court to answer to the questions regarding the scope of the justification arguments either. Besides, it seems that there is no actual need no longer to do such a separation between the justifications in the current state of the EU law. Nowadays, the EU has harmonized a lot the legal field so there is no longer a clear relevance for the Member States to plead mandatory requirements. Furthermore, the new market access test, which respects the principle of free movement of goods, seems to be affecting to the discrimination standard, making the difference between the Article 36 TFEU and the mandatory requirements rather vague when choosing which one to apply. In its case law, the Court has stressed that the environmental protection is one of key objectives of the EU.[191] Therefore it would seem fairly reasonable to be able to plead to it also when a national rule or practice would be considered to be "directly discriminatory".[192]

In its recent case law the Court has not been able to state it clearly whether discriminatory measures that are having an equivalent effect to quantitative restrictions can truly be justified by the environmental protection as an overriding requirement. Even though the Court decided not to categorize the Swedish measure to be directly discriminatory in a case of *Ålands Vindkraft*, yet still it was possible to justify discriminatory measures by referring to the environmental protection objectives. One should note though, that in the case the

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[188] Opinion of Advocate General *Sharpston* in C-73/08 *Bressol* [2010] ECR I-2735, para. 43.
[189] C-127/07 *Arcelor Atlantique and Lorraine* [2008] ECR I-9895 para. 23.
[190] Penttinen, Sirja-Leena, '*Ålands Vindkraft AB v Energimyndigheten - The Free Movement Law Perspective'*, vol. 13 - issue 3, OGEL (2015), p. 16, www.ogel.org.
[191] See for example, C-487/06 P *British Aggregates v Commission* [2008] ECR I-10505, para. 91; C-86/03 *Greece v Commission* [2005] ECR I-10979, para. 96; C-320/03 *Commission v Austria* [2005] ECR I-9871, para. 72; and C-176/03 *Commission v Council* [2005] ECR I-7879, para. 41.
[192] Penttinen, Sirja-Leena, '*Ålands Vindkraft AB v Energimyndigheten - The Free Movement Law Perspective'*, vol. 13 - issue 3, OGEL (2015), p. 16, www.ogel.org.

foreign electricity producers were not able to access to the support scheme, even if they were exporting green electricity to Sweden. Described as such, it seems rather confusing to describe the measure to be just indirectly discriminatory.[193] As stated above, the Court has been struggling to categorize the discriminatory measures and therefore it has accepted that the environmental protection is used in order to justify the discriminatory measures, as long as they are in accordance with the proportionality principle.[194]

Court's choice to avoid confirming clearly that environmental protection could justify discriminatory measures can be seen already in the case of *Walloon Waste*.[195] In the case concerned, the Court preferred to use so-called "workaround solution"[196], according to which the prohibition of importing waste was non-discriminatory, since based on the precautionary principle[197], environmental damage should as a priority be rectified at source.[198] According to the Court, since there were differences between the waste productions in different places and there was a connection with its place of production, the measure was non-discriminatory.[199] The Court took this stand; regardless that it is clear that a prohibition on imports is discriminatory. Advocate General *Jacobs* noted aptly that the judgment "[s]hows something else, namely that it is desirable that even discriminatory measures can sometimes be justified on grounds of environmental protection"[200].[201]

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[193] See for example; C-2/90 *Commission v Belgium* [1992] ECR I-4431 in which the Court decided that the measure which could be seen as discriminatory was not discriminatory because of the special nature of the subject matter of the case and then allowed the environmental justification. In Case C-320/03 *Commission v Austria* [2005] ECR I-9871 the Court chose to regard a measure as "indistinctly applicable" instead of indirectly discriminatory.

[194] Penttinen, Sirja-Leena, '*Ålands Vindkraft AB v Energimyndigheten - The Free Movement Law Perspective'*, vol. 13 - issue 3, OGEL (2015), p.17, www.ogel.org.

[195] C-2/90 *Walloon Waste* [1992] ECR I-4431. In the case concerned, Wallonia did not want waste that was from other Member States or other parts of Belgium to be imported into Wallonia.

[196] Advocate General Trsenjak described "workaround solution" in her opinion in C-28/09 *Commission v Austria* [2011] ECR I-13525, footnote 34.

[197] Article 191(2) TFEU.

[198] C-2/90 *Walloon Waste* [1992] ECR I-4431, para. 34.

[199] Court's reasoning in the case did not convince everyone and various commentators have criticized it. See for example; the opinion of Advocate General Jacobs in C-379/98 *PreussenElektra* [2001] ECR I-2099, para. 225. AG Jacobs clearly stated that "(…) the reasoning in *Walloon Waste* is flawed and should not be relied on the present case (…) I considered therefore that in assessing whether a measure is directly discriminatory regard cannot be had to whether the measure is appropriate". See also von Wilmowsky, Peter 'Waste disposal in the Internal Market: The State of Play After the ECJ's Ruling on Walloon import ban' *Common Market Law Review* 30 (1993) pp. 541,547, "As foreign wastes cause no different dangers for the environment than waste of domestic provenance, the origin of the wastes seems to have no effect on the pollution caused by their disposal". According to Wilmowsky, the Court's reasoning does not go along either with the case of C-172/82 *Interhuiles* [1982] ECR 555, in which the Court stressed that "it makes no difference from an ecological point of view whether wastes are disposed of in an [authorized] plant in the country of origin or in an [authorized] plant in another member state".

[200] Opinion of AG Jacobs in C-379/98 *PreussenElektra* [2001] ECR I-2099, para. 226.

The Court continued its line also in the case of *Aher-Waggon*.[202] The case concerned German rules according to which, in order to register an aircraft in Germany it had to pass certain noise limitations. According to the Court, these rules could be justified on the basis of public health and environmental protection without evaluating, if the barrier was directly discriminatory or not.[203] Public health is considered to be a public interest which can be based on the Treaty. In the case, the Court sort of backed up the justification of the environmental protection with the public health considerations.[204] Even though the Court did not want to categorize the German rules in the case at hand, it does seem that the Court is at least willing to reconsider whether in some situations discriminatory measures could be justified on the basis of environmental protection.[205]

All in all, one could conclude that the Court has consistently held that national legislation or a national practice that constitutes a measure having equivalent effect to quantitative restrictions may be justified on one of the public interest grounds listed in Article 36 TFEU or by overriding mandatory requirements. In either case, the national provision must be in accordance with the principle of proportionality, be appropriate for ensuring attainment of the objective pursued and must not go beyond what is necessary in order to attain that objective.[206]

### 3.3. Guidelines on State aid for environmental protection and energy 2014-2020

In order to highlight that environmental protection is an exception to the main rule; one should take a look at the Guidelines on State aid for environmental protection and energy

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[201] Penttinen, Sirja-Leena, '*Ålands Vindkraft AB v Energimyndigheten - The Free Movement Law Perspective*', vol. 13 - issue 3, OGEL (2015), p.18, www.ogel.org.
[202] C-389/96 *Aher-Waggon* [1998] ECR I-4473.
[203] See also the opinion of AG Jacobs in C-379/98 *PreussenElektra* [2001] ECR I-2099, para. 227: "That measure did, it seems to me, directly discriminate between domestic aircraft and imported aircraft in that aircraft previously registered in another Member State could not be registered in Germany even though aircraft of the same construction which had already obtained German registration before the German measure was adopted could retain that registration".
[204] Environmental protection is closely linked to the protection of human life and health. In some cases the Court seems to have treated environmental protection as part of public health and Article 36 TFEU: see for example, C-67/97 *Bluhme* [1998] ECR I-8033.
[205] Penttinen, Sirja-Leena, '*Ålands Vindkraft AB v Energimyndigheten - The Free Movement Law Perspective*', vol. 13 - issue 3, OGEL (2015), p.18, www.ogel.org.
[206] C-524/07 *Commission v Austria* [2008] ECR I-00187, par. 54. « En ce qui concerne les justifications invoquées par la République d'Autriche, il ressort d'une jurisprudence constante qu'une réglementation ou une pratique nationale qui constitue une mesure d'effet équivalent à des restrictions quantitatives ne peut être justifiée que par l'une des raisons d'intérêt général énumérées à l'article 30 CE ou par des exigences impératives ».

2014 – 2020 ('EEAG')[207] which includes specific provisions concerning environmental aid as a contribution to an objective of common interest.[208] According to general compatibility provisions;

(30): *"The general objective of environmental aid is to increase the level of environmental protection compared to the level that would be achieved in the absence of the aid. The Europe 2020 strategy in particular set targets and objectives for sustainable growth to support the shift towards a resource-efficient, competitive low-carbon economy.(--)The primary objective of aid in the energy sector is to ensure a competitive, sustainable and secure energy system in a well-functioning Union energy market"*

(88): "*For the aid to be compatible with the internal market, the negative effects of the aid measure in terms of distortions of competition and impact on trade between Member States must be limited and outweighed by the positive effects in terms of contribution to the objective of common interest."*

(116): "*In order to allow Member States to achieve their targets in line with the EU 2020 objectives, the Commission presumes the appropriateness of aid and the limited distortive effects of the aid provided all other conditions are met."*

In addition, the Commission states that it realizes that aid for environmental purposes tend to favor technologies and products that are environmentally friendly and that may happen at the expense of the others. It highlights that, the effect of the aid will, in principle, not be regarded as *an undue* distortion of competition, since it is inherently linked to the objective of the given aid, in other words, promoting development of green economy. When estimating the possible negative effects of the aid, the Commission will take into account measure's over all environmental effect compared to its negative impact on the market position and therefore on the profits of non-aided companies.[209]

When concerning the market integration of electricity from renewable sources, the Commission states that it is important that the ones getting the benefits are selling their electricity directly in the market and are therefore subject to market obligations.[210] Based

[207] Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1–55.
[208] Guidelines are designed to provide a framework for designing more efficient public support measures in order to integrate better renewables to the market. European Commission Press Release, State aid: Commission adopts new rules on public support for environmental protection and energy, 9 April 2014, IP 14/400.
[209] Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1–55, para.90.
[210] However, one should note that certain measures that amount to State aid do not need to be notified (i.e., measures that are block exempted). Supporting energy from renewable sources should be covered by the block exemption. Therefore, concerning the block exemption, one should read the Guidelines together with Commission Regulation (EU) No 651/2014 of 17 June 2014 declaring certain categories of aid compatible

on the Guidelines, the following cumulative conditions have been applied from 1 January 2016 to all new aid schemes and measures:

> a) aid is granted as a premium in addition to the market price (premium) whereby the generators sell its electricity directly in the market;
> b) beneficiaries are subject to standard balancing responsibilities, unless no liquid intra-day markets exist; and
> c) measures are put in place to ensure that generators have no incentive to generate electricity under negative prices.[211]

Whereas from 1 January 2017, according to following requirements, aid has to be granted in a competitive bidding process on the basis of clear, transparent and non-discriminatory criteria, unless:

> a) Member States demonstrate that only one or a very limited number of projects or sites could be eligible; or
> b) Member States demonstrate that a competitive bidding process would lead to higher support levels (for example to avoid strategic bidding); or
> c) Member States demonstrate that a competitive bidding process would result in low project realisation rates (avoid underbidding).

According to the Commission, in case such competitive bidding processes are open to all generators producing electricity from renewable energy sources on a non-discriminatory basis, the Commission will presume that the aid is proportionate and does not distort competition to an extent contrary to the internal market[212].[213]

Next, there are some relevant cases of the CJEU presented more specifically in order to demonstrate the Court's approach to the environmental protection as a justification for

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with the internal market in application of Articles 107 and 108 of the Treaty Text with EEA relevance OJ L 187, 26.6.2014, p. 1–78.

[211] Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1–55, para. 124.

[212] In a transitional phase covering the years 2015 and 2016, aid for at least 5 per cent of the planned new electricity capacity from renewable energy sources should be granted in a competitive bidding process on the basis of clear, transparent and non-discriminatory criteria. Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1–55, para. 126.

[213] See more consideration about the Guidelines; Talus, Kim and Penttinen, Sirja-Leena, 'Kohti toimivampia markkinoita- huomioita vihreän energiatuen kilpailutuksesta'. *Lakimies* 7-8/2015, p. 1147-1163.

discriminatory measures. One should especially pay attention on how the case law has evolved, and what type of changes there have been in the recent years when the environmental protection has become more important both globally and within the EU.[214]

[214]See more closely what kind of revisions the EU energy and environmental law has undergone throughout the past thirty years; Hey, Christian, *'EU Environmental Policies: A Short History of the Policy Strategies'*, in: S. Scheuer, (ed.) EU Environmental Policy Handbook (European Environmental Bureau 2005), 17; and Hancher, Leigh, 'Energy and the Environment: Striking a Balance?' 26:3 *Common Market Law Review* (1989), p. 475.

# 4 JUSTIFICATION OF THE NATIONAL SCHEMES: CASE-LAW

## 4.1 PreussenElektra

In this fourth chapter the focus is on the intervention in the free movement of goods, in other words, on what grounds there may be justified restrictions on trade. Since the research question in this study as presented at the beginning is; *whether national support schemes can be justified on the grounds of environmental protection even when they are intervening the free movement of goods within the EU, and where goes the fine line of justification?,* the focus here is also on the environmental basis justification which can be seen especially on the chosen case law. Also the proportionality of the restrictive measures is being shortly analyzed in the end of the chapter, even though naturally there is already partly proportionality analysis within the judgments themselves.

In case of *PreussenElektra*[215]the main aim of the German legislation was to promote the use of electricity from renewable energy sources. In order to reach the aim, the regional private electricity distribution companies were required to purchase electricity produced in their area of supply from the renewable energy sources at fixed minimum prices, which were higher than the real economic value of that type of electricity. The arrangement was created in order to provide a subsidy for the renewable energy generators. The main question in the case was, whether the purchase obligation is compatible with Article 107 TFEU and with the principle of free movement of goods, since the purchase obligation might affect negatively to the demand of such electricity in other Member States and therefore create a trade barrier to imports.

According to the Court, in *PreussenElektra* the German feed-in scheme was actually compatible with the free movement of goods provisions.[216] However, how the Court ended up taking this approach was far from clear.[217] The Court has been willing to allow schemes which have an impact on both trade and are discriminatory on the basis of environmental protection, as long as the importers also from other Member States have the possibility to

[215] C-379/98 *PreussenElektra* [2001] ECR I-2099.
[216] *Ibid*.
[217] See *inter alia* Bjørnebye, Henrik, '*Investing in EU Energy Security',* (Kluwer Law International, 2010) pp. 103-110 for a further review of the *PreussenElektra* case.

participate.[218] For example, the German scheme was clearly discriminatory and yet still the Court said it to be compatible with the free movement of goods provisions.

Advocate General *Jacobs* was considering the question, whether the directly discriminatory measures can be justified on the basis of imperative requirements to be regarded as fundamentally important. Advocate General's approach can perhaps be described to be "a bit more flexible", in sense that the imperative requirements of environmental protection according to him were; the integration principle in Article 11 TFEU and the fact that the environmental protection measures can be justified, when there is no risk for a situation where the purpose of the measure could be defeated or misused. National environmental protection measures are linked to the origin and the nature of the caused harm. Therefore, they can be regarded to be discriminatory since they are based on such accepted principle as; "[e]nvironmental damage should as a priority be rectified as source"[219] In that case, the measures no doubt have the kind of a discriminatory impact according to which they may be justified.[220] Even though the Advocate General brought this discussion on the table, the Court decided not to take a stand on the discriminatory measures relation to the environmental protection.[221]

Various facts of the case were considered by the Court; such as the positive impact of the renewable energy production on climate change whereas also the implementation of the UN Framework Convention on Climate Change[222] and its Kyoto Protocol[223]. Not to forget either, the ongoing process of the energy markets liberalization and the possible difficulties when determining the origin of energy once it has been introduced into electricity grids. After evaluating these facts, the Court stated that; '[h]aving regard to all the above considerations, the answer to the third question must be that, in the current state of Community law concerning the electricity market, legislation such as the amended

[218] Chalmers, Damien; Davies, Gareth and Monti, Giorgio, *European Union Law* (Cambridge University Press 2010), p. 773.
[219] Article 191(2) TFEU.
[220] Opinion of AG Jacobs in Case C-379/98 *PreussenElektra* [2001] ECR 2099, paras. 229-233.
[221] Talus, Kim, '*The Interface between EU Energy, Environmental and Competition Law in Finland*', vol 10-issue 4, OGEL (2012), p. 22-23, www.ogel.org.
[222] United Nations Framework Convention on Climate Change, opened for signature June 4, 1992, S. TREATY DOC. NO.102-38 (1992) (entered into force Mar. 21, 1994).
[223] The final version of the Protocol was issued as part of the Third Conference of the Parties UN DOC. FCCC/CP/1997/7/Add.2.

*Stromeinspeisungsgesetz* is not incompatible with Article 30 of the Treaty [now Article 36 TFEU].'[224]

In the light of the increasing urgency to cut down the greenhouse gas emissions, the rationale of the *PreussenElektra* judgment combined with the relevance of the Article 11 TFEU, it would seem to lead to the conclusion according to which; the measures introduced or specifically allowed through the secondary EU law would be justified (de facto at the minimum[225]) with the principle of the free movement of goods, even if these measures have a discriminatory effect or not.[226]

All in all however, *PreussenElektra* can be said to be a landmark judgment since for the first time, as mentioned above, the Court linked the EU's international commitments to reduce greenhouse gases with a national measure aiming to promote the use of renewables. [227] Furthermore, since the EU's internal energy market, especially the electricity markets, has developed a lot since the case of *PreussenElektra*, one need to consider whether the current state of the EU can yet still uphold territorial support schemes compatible with the free movement principle. Generally speaking, there is a clear problem behind the support schemes, since in most cases they do not directly prohibit imported electricity when it is produced from renewable energy sources, but the features of the scheme may have a discriminating effect towards the imported electricity. Obviously, this makes them rather hard to distinguish.[228]

### 4.2 Ålands Vindkraft

In the case of *Ålands Vindkraft,*[229] the CJEU found the Sweden's national support scheme promoting the national production of green electricity to be compatible with Article 34

[224] C-379/98 *PreussenElektra*, [2001] ECR 2099.
[225] Talus, Kim, '*The Interface between EU Energy, Environmental and Competition Law in Finland*', vol 10-issue 4 OGEL (2012), p.26, www.ogel.org.
[226]According to *Johnston et al*, Article 11 TFEU refers to the EU legislator and in that case it would not actually help with the questions related to compatibility with the Treaty provisions. See Johnston, Angus (et al), 'The Proposed New EU Renewables Directive: Interpretation, Problems and Prospects', 1 (2008) 3 *European Energy and Environmental Law Review*, p.134.
[227] C-379/98 *PreussenElektra* [2001] ECR I-2099, para.74.
[228] Penttinen, Sirja-Leena, *'The Role of the Court of Justice of the European Union in the Energy Market Liberalization'* in Kim Talus (ed.), Research Handbook on International Energy Law (2014), p. 264.
[229] C-573/12 *Ålands Vindkraft AB v Energimyndigheten* [2014] EUCLI:EU:C:2014:2037.

TFEU. The support scheme was established in accordance with Directive 2009/28/EC[230], according to which the Member States have to ensure that a certain percentage of their electricity production is green. However, Member States can nationally decide how to ensure this.

Shortly as a background, Sweden had a support system for renewable energy production called *Elcertificat* system, according to which only electricity installations in Sweden and Norway are entitled to get these "green" electricity certificates. A green certificate market means that companies are obliged to have a certain share of their power supply to be renewable electricity. In order to achieve this goal, renewable electricity producers are given certificates for the amount of power they produce. Companies may then buy these certificates on an open market. Ålands Vindkraft AB, an electricity company from Åland wanted to be awarded green certificates for its wind farm located in the archipelago of the Åland islands, in Finland. Swedish authorities however, declined the request. The preliminary question was, whether the Swedish national legislation constitutes a measure having an equivalent effect to quantitative restrictions on imports as it is stated in Article 34 TFEU and if so, could this be anyhow justified on the grounds of environmental protection.

It is rather obvious, that both the effect and the aim of the Sweden's system are discriminatory towards foreign producers. The certificates give a competitive advantage for the Swedish producers, both on the Swedish market, but also in the markets in which they sell their electricity. One should note, that the Swedish law itself does not state that the scheme is meant only for national producers, but instead this interpretation is drawn from the preparatory documents related to the Swedish law on electricity certificates.[231] According to Advocate General Bot, the Swedish "measure" is a discriminatory restriction on the free movement of goods, which, as such is prohibited by Article 34 TFEU since, "[t]the fact that it is impossible for electricity producers located in other Member State to have access to the green certificate scheme when they export green electricity."[232] However, the Court's approach was not as explicit and it seemed to have some difficulties

[230] Directive 2009/28/EC.
[231] In Sweden, the preparatory documents are often used as sources of law in the application and interpretation process, see C-478/99 *Commission v Sweden* [2008] ECR I-4147, paras. 23-25. Penttinen, Sirja-Leena, '*Ålands Vindkraft AB v Energimyndigheten - The Free Movement Law Perspective*', vol. 13 - issue 3, OGEL (2015), www.ogel.org.
[232] Opinion of AG Bot in C-573/12 *Ålands Vindkraft* [2014] ECLI:EU:C:2014:37 para.77.

in order to define the nature of the Swedish arrangement and the correct justification category in the case.

According to CJEU, the arrangement infringed the article 34 TFEU in two different ways. Firstly, based on the legislation in order to meet their quota obligations, suppliers and certain consumers were required to have certain number of electricity certificates by a certain annual due date. Since there was not an international agreement concerning this matter, only the national schemes were to be used to meet that obligation. Consequently, these suppliers and consumers are therefore required to buy these national certificates for the electricity they import, failing to do so they have to pay a certain specific fee. Court concluded that, such measures are therefore capable of impeding electricity imports from other Member States.[233]

Domestic green electricity producers may create trade barriers as a result of stagnation of the Swedish government by analogy to the *Angry Farmers*[234] case, in which the CJEU found that the government has a positive duty to ensure the free movement of goods. The CJEU noted that the Swedish rules may lead to the situation where the Swedish electricity producers would sell their electricity and the certificates "as a package". According to the CJEU, the reason why the Swedish legislation allows this arrangement results in an infringement of article 34 TFEU, since this "[f]ailure by a Member State to adopt adequate measures to prevent barriers to the free movement of goods that have been created, in particular, through the actions of traders but made possible by specific legislation that State has introduced, is just as likely to obstruct intra-Community trade as is a positive act".[235]

After stating that the Swedish arrangement is an obstacle for a free trade, the Court however found this arrangement to be justified on the grounds of environmental protection and therefore compatible also with Article 34 TFEU. With this approach, the CJEU obviously left the margin of discretion to the Member States letting them to decide how they want to proceed in order to tackle climate change in their territory, yet still in accordance with the common EU goals. Although, perhaps there could have been more

[233]C-573/12 *Ålands Vindkraft AB v Energimyndigheten* [2014] ECLI:EU:C:2014:2037, paras. 68-70.
[234] C-265/95 *Commission of the European Communities v French Republic* [1997] ECR- I-06959. According to the Court, by abstaining from adopting all the measures appropriate in order to ensure the free movement of agricultural products from other Member States on its territory, the French Republic failed to respect the fundamental principle of the free movement of goods and the duty of cooperation which the EC Treaty imposes on the Member States.
[235]C-573/12 *Ålands Vindkraft AB v Energimyndigheten* [2014] ECLI:EU:C:2037, para. 74.

clearly reasoning in the judgment, why these arrangements were proportionate instead of just stating them to be.

All in all, the CJEU firstly repeated its previous statements founded in *PreussenElektra*, stating that in order to protect the environment, the health and life of humans, animals and plants, the reduction of greenhouse-gas emissions is needed and this being also in line with the EU's international commitments.[236]

The CJEU also took into consideration the principle of proportionality. The CJEU listed three key arguments for the acceptance of this territorial limitation. First, the CJEU stated that a national support scheme is designed to help the production of green electricity rather than just its consumption. In addition, the green nature of the electricity, in other words, the greenhouse gas emissions are related to only to its method of production and therefore it is rather difficult to determinate the specific method of production once electricity has been allowed into the transmission or distribution system.[237]

The CJEU's approach is rather different to the approach that was taken in the *Outokumpu Oy* case, in which the CJEU held that "[w]hile the characteristics of electricity may indeed make it extremely difficult to determine precisely the method of production of imported electricity and hence the primary energy sources used for that purpose, the Finnish legislation at issue does not even give the importer the opportunity of demonstrating that the electricity imported by him has been produced by a particular method in order to qualify for the rate applicable to electricity of domestic origin produced by the same method".[238] In the case of *Outokumpu,* it was Swedish hydro power imported to Finland so interestingly the case was actually the opposite of the *Ålands'* case.

Secondly, the CJEU made a reference to the mandatory national targets laid down by the Directive 2009/28/EC according to which, the targets may vary between the Member States and the territorial nature of existing support schemes is recognized.[239] The Court emphasized the intention of the EU legislator and stressed, that instead of seeking a full harmonization of national support schemes for green energy production, the aim of the Directive was to ensure the proper functioning of the different national support schemes.

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[236] C-573/12 *Ålands Vindkraft AB v Energimyndigheten* [2014] ECLI:EU:C:2037, paras. 77-82.
[237] *Ibid*., paras. 95-96.
[238] C-213/96 *Outokumpu* [1998] ECR I-1777, para. 39.
[239] C-573/12 *Ålands Vindkraft AB v Energimyndigheten* [2014] ECLI:EU:C:2037, paras. 97-99.

One of the main objectives of the adopted framework, in this regard, was to maintain investor confidence.[240]

Thirdly and lastly the CJEU noted that, Sweden was legitimately able to consider that scheme's territorial limitation did not go beyond what was necessary in order to achieve the objective of the Directive 2009/28/EC and the scheme itself: increasing the production and therefore also indirectly consumption of green electricity within the EU.[241]

All in all, the outcome of this judgment is convincing, but perhaps the CJEU could have explained a bit more specifically why the territorial limitation of the support scheme was in accordance with the proportionality principle. The CJEU mainly concentrated on the legislative context by stating that, it was rather difficult to determinate whether the electricity is produced in a "green way" whereas also noting that, the measures were necessary in order to create investor confidence. However, the CJEU did not made a clear conclusion with any explicit normative statement. Perhaps the CJEU could have highlighted a bit more clearly that, in order to guarantee the effective functioning of the national support scheme for domestic green electricity production, it was actually essential to have a territorial limitation. In addition, as stated earlier in this study, supporting only domestic production is justified, since it is mandated by the EU legislature. Based on these two notions, once could say that the measure was clearly in accordance with the proportionality principle; it was promoting the domestic green electricity production, and it did not go any further than needed in order to achieve this aim. As a conclusion, one could assume that the CJEU was, and probably will take a strong stand also in the future for the protection of public interests such as combating climate change.

The current regime quite clearly encourages to create and hold on to the existing support schemes even though they would create an obstacle to trade. In order to tackle this, an EU level approach would be needed in order to abolish the negative effects of regulatory competition between Member States while they are promoting the green electricity. This would be also one step towards removing the trade obstacles in green electricity markets throughout the whole Union. On the other hand, the question is how an EU level approach should be created and whether it would be even possible in the end. There will be more consideration about this matter later on in this study.

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[240] C-573/12 *Ålands Vindkraft AB v Energimyndigheten* [2014] ECLI:EU:C:2037, para. 99.
[241] *Ibid*., para. 104.

### 4.3 Essent Belgium

In the case of *Essent Belgium*[242], the Belgian government fined The Belgian electricity supplier Essent Belgium BV ("Essent") for failure to comply with Belgian legislation according to which, the national electricity suppliers were obliged to purchase a certain amount of green energy from Belgian suppliers. As one can see, the case at hand is very similar to the case of *PreussenElektra*[243], however, one should keep in mind that the European energy market, especially the electricity sector, has undergone substantial changes over the time and therefore also the legislative context has changed a lot since the previous case. Based on the current legislative framework of the EU, Member States are enable to verify, if electricity produced in other Member State is green or not.[244] Besides this, Member States are also required to reach certain national goals for contribution to the production of green electricity.

Few words about the background; a green certificate scheme was established in the Flemish Region for the producers of green electricity. The purpose of the certificate scheme was to support investments in electricity produced from the renewable energy sources in that area. According to the scheme, one green certificate is issued to eligible green energy producers for each 1000 kWh generated, whereas suppliers are annually required to submit a quota of certificates to the Flemish Authority for the Electricity and Gas Market ("the VREG"). On the basis of the scheme, the suppliers must obtain the certificates from the local producers of green electricity at market prices in order to fulfill their quota obligation and be therefore eligible to the scheme. Therefore, the scheme creates an artificial market for the green certificates benefitting the eligible producers.

The Belgian electricity supplier Essent was obliged to submit green certificate quotas to VREG from 2003 to 2009 in order to be eligible to the scheme. Essent submitted guarantees of origin according to which, electricity produced in Norway and Netherlands was from renewable energy sources. Guarantees of origin are not enough for the subsidy as such, whereas on the other hand, green certificates are providing a statutory subsidy

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[242] Joined Cases C-204/12 to C-208/12, *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteitsen Gasmarkt* [2014] ECLI:EU:C:2014:2192.
[243] C-379/98 *PreussenElektra* [2001] ECR I-2099.
[244] A guarantee of origin proofs that electricity has been produced from renewable energy source as set out in Article 15 of the prevailing Renewables Directive 2009/28/EC (formerly in Article 5 of the Renewables Directive 2001/77/EC).

scheme by requiring the suppliers to submit a certain amount of certificates on the bases of their quota obligation.

According to Flemish legislation, only those green certificates that were issued to the eligible producers of green electricity in the Flemish area fulfilled the quota obligation of the suppliers. Therefore, the guarantees of origin that Essent submitted were not accepted and the company was fined by VREG by failing to submit the certain amount of green certificates.[245]

The main preliminary questions were: firstly, whether the green certificate scheme in question was compatible with the free movement of goods provisions in Articles 34 and 36 TFEU (and the corresponding provisions in Articles 11 and 13 of the EEA Agreement); secondly, whether the scheme was compatible with the guarantees of origin provision in Article 5 of the first Renewables Directive 2001/77/EC; and thirdly, whether the scheme at issue was compatible with the principle of equal treatment and the prohibition of discrimination as enshrined in both TFEU primary law provisions and in Article 3 of the former Electricity Directive 2003/54/EC.

The Court noted that the Directive does not provide any link between the green certificate schemes and guarantees of origin.[246] The Court stressed, *inter alia*, that the purpose of the Directive was not to establish a Union-wide support scheme for the Member States. In addition, according to the Court, the guarantee of origin do not by themselves imply a right to benefit from national support mechanisms established in different Member States; and the recital 11 in the preamble to that Directive states that it is important to distinguish guarantees of origin clearly from those certificates.[247] The Court followed its reasoning, by analogy to its recent judgment in *Ålands Vindkraft*[248], by stating that the EU legislature did not intend to require Member States, who opted for a support scheme using green certificates, to extend that scheme to cover green electricity produced on other Member States.[249] Following from this, the Court concluded: Article 5 of the first Renewables Directive 2001/77/EC does not rule out a scheme even though it would state that the

[245] Joined Cases C-204/12 to C-208/12, *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteitsen Gasmarkt* [2014] ECLI:EU:C:2014:2192, paras. 15-29.
[246] *Ibid*., paras. 59-61.
[247] *Ibid.*, paras. 62-63.
[248] *Ålands Vindkraft* [2014] ECLI:EU:C:2037, paras. 53-54.
[249] Joined Cases C-204/12 to C-208/12 *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteitsen Gasmarkt* [2014] ECLI:EU:C:2014:2192, para.66.

suppliers are not allowed to fulfill their quota obligation by using guarantees of origin from other Member States.[250]

Out of the preliminary questions, the question concerning the free movement of goods provision of the Treaty was the most difficult one. The national Court referred to the Articles 34 TFEU and 36 TFEU ( also to the corresponding provisions in Articles 11 and 13 EEA), but the Court however wanted to stress, that when evaluating the case at hand, also the former provisions in Articles 28 EC and 30 EC should be taken into account.[251] As mentioned above, the Essent failed to submit the required amount of green certificates from 2003 to 2009, so the Court proceedings at the national level had been going on for years already before the preliminary ruling.

According to the VREG, the guarantees of origin are not regarded as "goods" within the meaning of Articles 34 and 36 TFEU. Whereas on the other hand, the Advocate General Bot argued that, since the support scheme did have an impact on electricity imports and electricity itself has been clear out to be a "good", it was not even necessary for the guarantees of origin or the green certificates to be held as goods themselves.[252] It is actually an interesting question, whether the guarantees of origin, which are incidental to the electricity supplied, could be considered to be "goods" on their own within the meaning of Treaty.[253] However, the Court left this question open and stated later on in the judgment that, even if the guarantees of origin were themselves to be held as goods in the meaning of Article 34 TFEU, the restriction on the free movement of goods was anyhow justified.[254]

As mentioned earlier, the main question in this case was; whether the Flemish support scheme posed restriction on electricity imports. The Court approached the question the same was as it did in *Ålands Vindkraft*, by going through the well-known *Dassonville* formula. According to which Article 34 TFEU covers: "[a]ny national measure which is

[250] See also AG Bot's opinion to the Court in Joined C-204/12 to C-208/12 *Essent Belgium*, paras. 47-59.
[251] However, for sake of clarity, only the current Articles 34 and 36 TFEU are referred from now on, even though one should note that Articles 11 and 13 EEA are parallel to the current TFEU provisions.
[252] AG Bot's opinion to the Court in Joined C-204/12 to C-208/12 *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteitsen Gasmarkt*, paras. 72-76.
[253] Bjørnebye, Henrik, '*Joined Cases C-204/12 to C-208/12, Essent Belgium',* vol.13-issue 3 OGEL (2015) p.4, www.ogel.org.
[254] Joined Cases C-204/12 to C-208/12 *Essent Belgium NV v Vlaamse Reguleringsinstantie voor de Elektriciteitsen Gasmarkt* [2014] ECLI:EU:C:2014:2192, para. 81.

capable of hindering, directly or indirectly, actually or potentially, intra-Community trade". Following that the national scheme: "[i]s capable, in various ways, of hindering – at least indirectly and potentially – imports of electricity, especially green electricity, from other Member States"[255], just as the Court stated already in *Ålands Vindkraft.*

Since the suppliers were required to purchase the certificates, and the eligible electricity producers had the possibility of selling green certificates together with renewable electricity they had produced, the Court held the schemes to be a restriction that could also affect to the long-term contracts.[256] The Court stated that, the support scheme such as it is in this case at hand, *at least potentially*, could curb electricity imports from other Member States.[257]

One could perhaps wonder, whether the way the Court described the scheme to be "potentially" restricting the imports from the other Member States, was kind of an understatement. The scheme in question as matter of fact creates an obligation for national suppliers to buy these certificates from their national producers and, therefore one could argue the scheme should have been more correctly described to be directly discriminatory, instead of only stating that it may potentially restrict electricity imports.[258] Advocate General Bot's opinion,[259] whereas also the Court's previous judgments in *PreussenElektra* and *Ålands Vindkraft* backed up this view so therefore it is rather interesting that the Court decided to use different type of wording in the case at hand.

The *Essent Belgium* was a keenly awaited judgment, which in the end anyhow, not that surprisingly, followed the path the Court had already taken in *Ålands Vindkraft.* One could say the main outcome from the case was to reaffirm that the national support schemes can be justified with the free movement of goods principle regardless of their territorial restrictions. Naturally, one should keep in mind that every scheme is designed differently and, therefore to be made subject to scrutiny and be proportionate under the free movement

[255] Joined Cases C-204/12 to C-208/12 *Essent Belgium* [2014] ECLI:EU:C:2014:2192, paras. 77 and 83.
[256] *Ibid.*, paras. 84-87.
[257] *Ibid.*, para. 87 and C-573/12 *Ålands Vindkraft* [2014] ECLI:EU:C:2014:2037, paras. 72-73.
[258] Bjørnebye, Henrik, '*Joined Cases C-204/12 to C-208/12, Essent Belgium*', vol.13-issue 3 OGEL (2015) p.5, www.ogel.org.
[259] AG Bot's opinion to the Court in Joined C-204/12 to C-208/12 *Essent Belgium,* paras. 78-84.

of goods provisions of the Treaty.[260] Therefore, even though the territorial limitation could be seen to be necessary, the Court wanted to evaluate also whether the *design* of the scheme was in accordance with the proportionality principle. According to the Court, in order the scheme to be proportionate, however, they need to be designed for a genuine market. A genuine market in this case means that the relevant suppliers are able to buy certificates fairly and the fines, which are imposed on suppliers in order them to fulfill their quota obligations, cannot be more than necessary to attract the producers to use more renewable energy generation and suppliers to buy those certificates.[261]

The Court also noted that national legislation or a national practice which constitutes a measure having equivalent effect to quantitative restrictions may be justified on grounds of public interest as listed in Treaty or by overriding mandatory requirements. In both cases, the national measure must be in accordance with the proportionality principle, be appropriate regarding of the objective pursued and must not go beyond on what is necessary in order to achieve this objective.[262] According to Advocate Bot, the exemption to the traditional rule should be made on the grounds of environmental protection, since it would emphasize the EU's attempt to protect the environment reflected, *inter alia*, by the principle of environmental integration.[263] According to the Court, it must be acknowledged that the objective of promoting the use of renewable energy sources for the production of electricity, such as the objective pursued by the legislation is in this case at hand, is in principle capable of justifying barriers to the free movement of goods.[264]

Even though the Court did not consider the measure to be directly discriminatory, it could in principle, to be justified on the basis of overriding requirements related to the protection of environment.[265] In the end, it was not surprising that the Court ended up with the same conclusion as it had already reached in the *Ålands Vindkraft* case, according to which the objective of promoting the electricity generated from the renewable sources was as in principle able to justify the restriction also in this case of matter. The Court stated that: "[…] it must be acknowledged that since, inter alia, EU law has not harmonised the

[260] Bjørnebye, Henrik,*' Joined Cases C-204/12 to C-208/12, Essent Belgium',* vol.13-issue 3 OGEL (2015) p.9, www.ogel.org.
[261] Joined Cases C-204/12 to C-208/12 *Essent Belgium* [2014] ECLI:EU:C:2014:2192, para. 97, with further reference to C-573/12 *Ålands Vindkraft* [2014] ECLI:EU:C:2014:2037, paras. 104-116.
[262] *Ibid.*, para. 89, with further reference to Case C-573/12 *Ålands Vindkraft* [2014] ECLI:EU:C:2014:2037, para. 76.
[263] AG Bot's opinion to the Court in Joined C-204/12 to C-208/12 *Essent Belgium* paras. 86-97.
[264] Joined Cases C-204/12 to C-208/12 *Essent Belgium* [2014] ECLI:EU:C:2014:2192, para. 95.
[265] *Ibid*., para. 90.

national support schemes for green electricity, such a territorial limitation may in itself be regarded as necessary in order to attain the legitimate objective pursued in the circumstances, which is to promote increased use of renewable energy sources in the production of electricity […]".[266] Both in *Ålands Vindkraft* as in *Essent Belgium*, the Court made a reference to the public interest grounds of protection the health and life of humans, animals and plants as it is set by the Article 36 TFEU.[267]

The question remains, whether a national support scheme which is benefitting national production of green energy, without giving the same incentives to the producers alike from another Member States, will always be compatible with the non-discrimination principle. The Court also left unsaid whether the guarantees of origin as they are, can be considered to be *goods* in the sense as they are stated in the Treaty. In the case of *Essent Belgium* however, case wise, it was not necessary to conclude this question.[268]

### 4.4 What can we learn from these cases

As presented in the previous parts, the Court upholds many national support schemes for renewable energy as they are, with territorial limitations. With this conclusion, the CJEU confirmed that national mandatory targets for renewable energy under the Renewable Energy Directive may require support schemes to be limited to the national territory.

As one can see, the environmental protection has blurred the separation between the two justification categories.[269] In the case of *PreussenElektra*, the Court stressed that the compatibility of the German legislation with Article 34 TFEU was closely related to the current state of the EU energy law, and therefore the judgment of *Ålands Vindkraft* was understandably awaited update. Advocate General Bot estimated that, the development of the EU energy markets, especially the current state of liberalization of the electricity markets and the mutual recognition of guarantees of origin, would make it necessary for the Court to reconsider whether its approach taken in *PreussenElektra* was still up to date. However, in the end the Court decided not to clarify more specifically, whether the

[266] Joined Cases C-204/12 to C-208/12 *Essent Belgium* [2014] ECLI:EU:C:2014:2192, para. 97, with further reference to Case C-573/12, *Ålands Vindkraft* [2014] ECLI:EU:C:2014:2037, paras. 90-95.
[267] *Ibid.*, para. 93 with further reference to Case C-573/12 *Ålands Vindkraft* [2014] ECLI:EU:C:2014:2037, para. 80.
[268] Bjørnebye, Henrik, '*Joined Cases C-204/12 to C-208/12, Essent Belgium*', vol.13-issue 3 OGEL (2015) p. 9, www.ogel.org.
[269] Penttinen, Sirja-Leena, '*Ålands Vindkraft AB v Energimyndigheten - The Free Movement Law Perspective*', vol. 13 - issue 3 OGEL (2015) p. 20, www.ogel.org.

justification of discriminatory measures on the basis of environmental protection should be considered any differently than what it was already back in *PreussenElektra*.

In both, *PreussenElektra* as well as in, *Ålands Vindkraft*, the Court accepted the support schemes on the environmental grounds, without any specification of the nature of the measure. As presented earlier in this study, since the environmental protection is one of the key objectives of the EU nowadays, and it is also highlighted in the TFEU, so therefore it would seem rather absurd not to take into account the environmental objectives as such. In each case the restrictive measure should be also evaluated to see whether the environmental protection objective fits with the proportionality requirements and can be therefore justified.

Advocate General Bot argued that, in both *Essent Belgium* and *Ålands Vindkraft*, the national support schemes were not satisfying the proportionality requirement. Advocate General based his argument on the Court's previous reasoning in *PreussenElektra,* whereas also to the arguments presented in *Essent Belgium*, stating rather clearly in *Ålands Vindkraft* that:

> *"[…] whilst it is easy to accept that green certificate schemes contribute to environmental protection by stimulating the production of green energy, it would, on the other hand, appear somewhat paradoxical to assert that the importation of green energy from other Member States might undermine environmental protection."*[270]

However, Advocate General is not taking into account the clear challenge the EU-wide subsidy scheme would cause instead of a national one, especially when there is no unambiguous EU secondary legislation covering that area. If the EU-wide support scheme is not a realistic alternative, not at least at this very moment, one could argue that in that sense the national support scheme seems the only solution for this matter.[271]

The *Ålands Vindkraft* was awaited judgment especially at the national energy sector and therefore no wonder why particularly the Member States welcomed warmly the statement that the national support schemes may stay national. Ironically, the judgment actually does

[270] AG Bot's opinion to the Court in Case C-573/12 *Ålands Vindkraft*, [2014] ECLI:EU:C:2014:37, para. 93.
[271] Bjørnebye, Henrik, '*Joined Cases C-204/12 to C-208/12, Essent Belgium',* vol.13-issue 3 OGEL (2015) p.7, www.ogel.org.

fit into the current state of EU energy law and policies.[272] Apparently, 13 years development of the EU's energy sector has not affected that greatly to the "current state of the EU law"; at least that is how it seems based on the Court's approach. Naturally, also from the renewable energy industry's point of view the judgment was a good one. As any industry, energy needs long-term investments and in order to foster the development the support schemes should also be designed for a longer period of time[273].[274]

As mentioned above, according to Advocate General Bot, from the judicial point of view the Court's arguments on the justification of the territorial restrictions in order to protect environment, were not that convincing. However, perhaps one could argue the Court's approach to be more realistic one, even though the opinion of the Advocate General could be seen the more judicially right one.[275] Unfortunately, Court's judgments' justification is quite often lacking the credibility, since the Court's arguments are incomplete and the content of the used sources of law is left open. Especially the Treaties as sources of law are often left unapplied, since the Court is rather referring to its own previous preliminary rulings, even when the judgments could be directly based on the Treaties. Even though the opinion of an Advocate General is often affecting to the final judgment, the Court seldom refers to it in its reasoning.[276]

What if the Court would have come into another conclusion? In that case, already functioning national support schemes could have been concluded to be incompatibles with the EU law and therefore needed to be abolished. Naturally, that type of judgment could have affected to the investors' actions also at the renewable energy sector. If the support schemes would have been contrary to the free movement provisions that would have had great consequences in the light of the current European approach towards the investments

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[272] The Court noted that the promotion of the renewable energy sources for the protection of the environment is the objective of the Renewable Energy Directive. Besides that, the Court also made a reference to the international agreements such as Kyoto Protocol that the EU has ratified in order to battle against the climate change. See C-573/12 *Ålands Vindkraft* [2014] ECLI:EU:C:2014:2037, para. 79.

[273] Penttinen, Sirja-Leena, '*Ålands Vindkraft AB v Energimyndigheten - The Free Movement Law Perspective*', vol. 13 - issue 3 OGEL (2015) p. 20-21, www.ogel.org.

[274] Renewables do no longer need high economic incentives, but they do still need predictable and long-term regulatory and market frameworks. International Energy Agency's (IEA) Ministerial Statement on Energy and Climate Change, available at https://www.iea.org/media/news/2015/press/IEA_Ministerial_Statement_on_Energy_and_Climate_Change.pdf (Last accessed 9.1.2017).

[275] Penttinen, Sirja-Leena, *'Ålands Vindkraft AB v Energimyndigheten - The Free Movement Law Perspective*', vol. 13 - issue 3 (OGEL 2015) p.21, www.ogel.org.

[276] Paso, Mirjami, *'Viimeisellä tuomiolla: Suomen korkeimman oikeuden ja Euroopan yhteisöjen tuomioistuimen ennakkopäätösten retoriikka'*, (Helsinki 2009), p. 197–199, 202, 206 and 236–237.

in electricity generation from the renewable sources, since the green certificate and the feed-in schemes are applied widely in the Member States[277].[278] Therefore, one could say the judgment was aiming to reassure the development of the renewable energy sector. Clearly, the current support schemes are part of the development of the energy sector and, at least for now, the Court could not go to any other direction without affecting to the development. Both the Court and the Advocate General stressed that perhaps the provision in the Renewable Energy Directive, according to which, the Member States may voluntarily coordinate their national support schemes together should be emphasized more. The fact is the Member States have sovereignty over their energy mixes and they also have different national possibilities for renewable energy promotion. Therefore, voluntary coordination would seem a lot more reachable goal than a "one size fits all"- type of regulation from the EU level.[279] There will be more consideration about joint approaches later on this study.

When considering the free movement of goods principle, the judgment of *Ålands Vindkraft* was still left a bit incomplete. The clarification for the rather unclear status of environmental protection as a justification ground was clearly needed and awaited. As *S-L, Penttinen* highlighted in her article: "[C]ourt's approach to environmental protection as a defense category can clearly be identified in its case law since Walloon Waste, the Court says quite a lot without saying actually that much. These cases seem to indicate that in terms of imperative requirements, environmental protection stands out as a category capable of justifying discriminatory measures (--)." In addition, the current state of the market access test and its impact on the necessity of having two different justification categories would need also a clarification from the Court in order to secure the legal certainty also in the future.[280]

The environmental protection as a ground for justification of discriminatory restrictions should be approved[281], especially on the basis of the resent case law that have emphasized

[277] For a recent overview, see Council of European Energy Regulators, Status Review of Renewable and Energy Efficiency Support Schemes in Europe (25 June 2013).
[278] Penttinen, Sirja-Leena, '*Ålands Vindkraft AB v Energimyndigheten - The Free Movement Law Perspective*', vol. 13 - issue 3 OGEL (2015) p. 21, www.ogel.org.
[279] *Ibid.*
[280] *Ibid.*
[281] Trstenjak, Verica and Beysen, Erwin, 'The Growing Overlap of Fundamental Freedoms and Fundamental Rights in the case-law of the CJEU', 3 (38) *European Law Review* (2013), p.302.

the environmental protection to be one of the most important objectives of the EU.[282] However, it is not surprising that the Court needs to balance between the free movement of goods principle and the environmental protection, especially when it comes to energy related cases. The Court has stressed that; "[t]he prohibition of quantitative restrictions and measures having equivalent effect laid down by Article [34 TFEU] applies not only to national measures, but also to measures adopted by the [European Union] institutions", but in some cases the actual reality may restrict the full exercise of fundamental freedoms regardless that[283].[284]

When looking at the bigger picture around the cases, it raises interesting questions in relation to the increasing role of the state in the EU energy market and the application of free movement law. As in the cases discussed in this study, the emphasis was more on internal market law instead of competition law. This could raise a question what is the relationship between the secondary law provisions and the primary law regarding free movement. Based on this question; one could also ask firstly; whether a rather weak integration process affected to the regulation of the market under the secondary law, at least in some extend; and secondly if the regulation can truly keep up with the rapidly changing energy markets, when considering for example the renewable energy promotion.[285]

One could argue that, the need for state control has increased and therefore there have been lately more free movement law related cases brought before the CJEU. It is possible that also in the future, the current unclear situation between the different market players in the energy field will lead to more questions related to free movement of law. However, even though the role of the state seems to be increasing in the energy sector, it does not mean that the EU would be going back to the pre-liberalization phase, but instead it shows the current state of the EU law where there are multiple players and kind of "halfway house

[282] C-487/06 *P British Aggregates v Commission* [2008] ECR I-10515; C-86/03 *Greece v Commission* [2005] ECR I-10979 and C-176/03 *Commission v Council* [2005] ECR I-7879.
[283] C-15/83 *Denkavit Nederland* [1984] ECR 2171, para. 15; C-51/93 *Meyhui* [1994] ECR I-3879, para. 11; and C-114/96 *Kieffer and Thill* [1997] ECR I-3629, para. 27.
[284] Penttinen, Sirja-Leena, '*Ålands Vindkraft AB v Energimyndigheten - The Free Movement Law Perspective*', vol. 13 - issue 3 OGEL (2015) p. 22, www.ogel.org.
[285] Penttinen, Sirja-Leena, '*Case note on C-105/12-107/12 Essent and Others, judgment of 22 October 2013'*, OGEL (not yet published) p.13. www.ogel.org.

situation", as prescribed by *S.L. Penttinen.* Perhaps the free movement law is re-emerging in the EU-energy field.[286]

### 4.5 Proportionality

One of the most difficult questions the Court needed to consider in all of these cases was whether the national support scheme was in accordance with the proportionality principle in sense to be suitable and necessary in order to achieve its objective.[287] When considering this question, one need to evaluate whether a national support scheme, that lays down territorial restrictions, can be seen necessary in order to pursue a global objective of reducing the greenhouse emission and combating the climate change. One could ask whether it has any significant effect to the climate change if the emission reductions are carried out in one single Member State. Therefore with this logic, on what grounds it can be considered necessary to limit the scheme to cover only the national promotion of renewables.[288] The Member States may decide on their national support schemes, but how energy produced in other Member State would be any less "green" than the domestic one, if its origin can be assured and proofed.

When considering the outcome of the *PreussenElektra,* one of the clear shortcomings was the lack of Court's discussion of the discriminatory nature of the scheme. In order to do that, it would have required the Court to take a stand on the promotion of the environmental aims, a mandatory requirement under the *Cassis* formula [289] and a discriminatory measure to promote this aim.[290] As presented earlier, the discriminatory measures can be accepted under the exhaustive list laid down in Article 36 TFEU. When the EC Treaty was being negotiated, the environmental issues were not considered as essential as they are today and therefore it is not part of the list, nor had it been added to it

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[286] *Ibid*., p.13.
[287] Joined Cases C-204/12 to C-208/12 *Essent Belgium* [2014] ECLI:EU:C:2014:2192, para. 96.
[288] Bjørnebye, Henrik, '*Joined Cases C-204/12 to C-208/12, Essent Belgium*', vol.13-issue 3 OGEL (2015) p. 6-7, www.ogel.org.
[289] C-120/78 *Rewe-Zentral* (Cassis de Dijon) [1979] ECR 649.
[290]Baquero Cruz, Julio and Castillo de la Torre, Fernando, 'A Note on PreussenElektra', 26 (2001) *European Law Review*, p. 497 et seq. Bjørnebye, Henrik, '*Investing in EU Energy Security: Exploring the Regulatory Approach to Tomorrow's Electricity Production',* (Kluwer Law International 2010), p.108. However, a discriminatory measure can be justified on environmental grounds see for example; case C-2/90 *Commission v Belgium* (Walloon Waste) [1992] ECR I- I-4431. More recently about the relationship between the discriminatory measures and free movement of goods provisions see for example; Pecho, Peter, 'Good-Bye-Keck? A Comment on the Remarkable Judgment in *Commission v Italy*, C-110/05', 36 (2009) 3 *Legal Issues in Economic Integration*.

later on even though there would have been possibility to do so.[291] The lack of this rather current addition is causing uncertainty to the state of affairs.[292]

The objectives of the support schemes and their protection should be seen through the EU lens considering the overall objectives of the EU's energy market integration, instead of only one single Member State's point of view.[293] The judgments analyzed above, highlights the traditional approach according to which purely economic reasons cannot justify trade restrictions, if the objective does not also serve a wider public good at EU level; in these cases environmental protection.

The proportionality of the environmental measures was also examined in the case of *Commission v Austria*[294], in which the Court stated that on the basis of its previous case-law, the national measures that are possibly obstructing the intra-EU trade may be justified on the basis of overriding requirements related to the environmental protection, if only the measures at hand are proportionate to the aim. After emphasizing the importance of the environmental protection[295] and referring to the principle of integration, the Court highlighted the *fundamental nature* of that aim. The extension of the aim touches the range of policies and activities and therefore the question moved to consider whether the measures at hand were proportionate with the legitimate aim pursued in this case.[296] In this case of Austria, the measures actually did not pass the proportionality test and the Austrian regulation was regarded to be incompatible with Articles 28 EC and 29 EC. Next chapter will concentrate on the outlook the schemes may have in the future.

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[291] Johnston, Angus (et al), 'The Proposed New EU Renewables Directive: Interpretation, Problems and Prospects', 1(2008) 3 *European Energy and Environmental Law Review*, p.132.
[292] As also stated already earlier in this study, the traditional approach making a clear cut between discriminatory and non-discriminatory measures have perhaps started to fade without making such strong demarcation between the two anymore, see for example; Pecho, Peter, 'Good-Bye-Keck? A Comment on the Remarkable Judgment in *Commission v Italy*, C-110/05', 36 (2009) 3 *Legal Issues in Economic Integration*, p. 269.
[293] Penttinen, Sirja-Leena, '*Case note on C-105/12-107/12 Essent and Others, judgment of 22 October 2013'*, OGEL (not yet published) p.11, www.ogel.org.
[294] C-320/03 *Commission v Austria* [2005] ECR 1-9871.
[295] *Ibid.*, para. 72 with further references to C-240/83 *ADBHU* [1985] ECR 531, para. 13; C- 302/86 *Commission v Denmark* [1988] ECR 4607, para. 8; C-213/96 *Outokumpu* [1998] ECR I-1777, para. 32.
[296] C-320/03 *Commission v Austria* [2005] ECR 1-9871, para. 85.

# 5 WHERE FROM HERE?

## 5.1 Harmonization versus subsidiarity of support schemes

As presented earlier in this study, the Court declared the national support schemes to be justified on the environmental grounds, with territorial limitations. With this conclusion, the CJEU confirmed that national mandatory targets for renewable energy under the Renewable Energy Directive may require support schemes to be limited to the national territory. This fifth chapter concentrates to analyze how the future of the support schemes may look like, whether the schemes should be harmonized or kept the way they are in order for the EU to reach its climate and energy targets in the future. In addition, Commission's new Winter Package proposal is presented a bit more specifically and what changes it could mean for the schemes.

> *"Member States shall implement measures to achieve the objectives of (...) Environmental protection, which shall include energy efficiency/demand side management measures and means to combat climate change, (...) where appropriate."*[297]

The obligation seems very general and the wording "where appropriate" softens the obligation itself. Since Member States have already taken into consideration such measures as, the financial support for the renewables, this provision does not actually pose any additional obligations to Member States with the regards of renewable support mechanisms[298].[299] One could emphasize the principle of subsidiarity as stated in Article 5(2) TEU,[300] that in areas which do not fall under the Union's exclusive competence, the EU can only act if and in so far as the objectives of the proposed action cannot be sufficiently achieved by Member States, either at central level or at regional and local level, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level. Therefore, the difficulties created by mutually incompatible schemes between Member States would have to be evaluated when the objectives would be

[297] Article 3, §7 and 4 of the second Electricity and Gas Directives and Article 3, §10 and 8 of the third Electricity and Gas Directives.
[298] Directive 2001/77/EC of 27 September 2001 on the promotion of electricity produced from renewable energy sources in the internal electricity market, OJ L 283/33, 27.10.2001; and Directive 2009/28/EC of April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, OJ L 140/16-62, 5.06.2009.
[299] Deruytter, Thomas; Geldhof, Wouter and Vandendriessche, Frederik, 'Public Service Obligation in the Electricity and Gas Markets'. *EU energy Law and policy Issues. ELRF Collection* vol. 3. Bram Delvaux, Michaël Hunt, Kim Talus (Eds.) (Cambridge 2012), p.75.
[300] See also, Commission Green Paper on Services of General Interest, COM(2003) 270, 21 May 2003, para.77.

better addressed at the EU level. In other words, Member States enjoy freedom, unless EU legislation has obviously harmonized that issue in regards and imposed restrictions on that particular freedom.[301]

The amount of different kind of support schemes in Member States raises a concern how they work with the idea of a single market. Harmonizing the support schemes could possibly simplify the regulatory environment, help industrial growth whereas also provide better framework for the efficient use of renewables within the EU.[302] Surely, there would be great benefits[303], if there would more coordination over the renewable support schemes.[304]

Naturally, one could also ask whether the EU is truly ready for the harmonization just yet or would it be better to try to cooperate more[305] and improve the existing schemes instead of start creating new ones.[306]According to the Commission[307], still back in 2008 it seemed rather inappropriate to harmonize the Member States support schemes, mainly for four reasons;

(1) price-based and quantity based instruments have the same economic efficiency and they are designed to be compatible with the internal market rules for electricity, the EU state aid rules and the principle of free movement of goods

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[301] C-37/92 *Vanacker & Lesage* [1993] ECR I-4947, para. 9; C-324/99 *DaimlerChrysler* [2001] ECR I-9897, para. 32; C-322/01 *Deutscher Apothekerverband* [2003] ECR I-14887, para. 64 and C-309/02 *Radlberger Getränkegesellschaft mbH* [2004] ECR I-11763, para. 53.

[302] Johnston, Angus and Block, Guy, *EU Energy Law* (Oxford 2012), p.338.

[303] Commission Staff Working Document: Impact assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast). SWD(2016) 418 final Part 1/ 4, 30.11.2016, p. 82-83.

[304] Unteutsch, Michaela and Lindenberger, Dietnam, 'Promotion of Electricity from Renewable Energy in Europe Post 2020 – The Economic Benefits of Cooperation', in: *Zeitschrift für Energiewirtschaft*, Vol. 38 No. 1, (2014) pp. 47-64.

[305] As an examples where Member States have been trying to cooperate in accordance with Articles 5 and 11 of the Renewable Energy Directive 2009/28/EC, could be mentioned German, Spanish, and Slovenian feed-in cooperation aiming to promote feed-in regimes while exchanging information and experiences and also Swedish-Norwegian idea of a bilateral green certificate regime. Commission Staff Working Document: The support of electricity from renewable energy sources - Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources COM(2008) 19 final. SEC(2008) 0057 final, 23.1.2008. More detailed discussed in Johnston, Angus and Block, Guy, *EU Energy Law* (Oxford 2012), p.339.

[306] Commission Communication: The support of electricity from renewable energy sources COM(2005) 627 final, 7.12.2005.

[307] Commission Staff Working Document: The support of electricity from renewable energy sources - Accompanying document to the Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources COM(2008) 19 final. SEC(2008) 0057 final, 23.1.2008.

(2) creating one common system could create a lot of uncertainty and even disruption in the renewables markets disturbing well-established national support schemes
(3) it could turn out to be rather difficult to differentiate the costs of different technologies in the Member States in a harmonized system
(4) national support schemes are also often promoting regional development when EU level harmonization could force the Member States to find other ways for promotion.[308]

Investments for the renewable energy generation are not market based investments and the same trend goes also for the other type of energy infrastructure investments within the EU. The Union denied this for a long time, but now the reality is starting to become more obvious for the Union as well.[309] Since there is not one common EU-wide support scheme, one could argue that subsequently there is an actual need for national support schemes instead, naturally this effects to the trade between the Member States.[310] Perhaps one could also say, that the EU legislator has actually accepted the different, even discriminatory, national support schemes with its choice of a legal base, Article 192 TFEU[311], and in addition with its rather flexible use of mechanisms under Directive 2009/28/EC.[312]

Undeniably, the investors cannot expect that the regulations and policies will maintain the same forever, since the states have the right to decide where they are heading with their energy policies. However, there are certain boundaries in which the investors can count on. The Court has affirmed that the legitimate expectations and the principle of legal certainty does not mean that an investor or an individual could expect the legislation to remain unchanged, but they can expect that the special circumstances of the economic actors involved would be taken into account when the legislation is being amended.[313] The Court has also stated that; "[t]he principle of legal certainty requires, particularly, that the rules of

[308] Johnston, Angus and Block, Guy, *EU Energy Law* (Oxford 2012), p.340.
[309] See for example, Energy 2020: A strategy for competitive, sustainable and secure energy. At least according to this document, the public sector involvement in future investments is the key factor here. Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Energy 2020. A strategy for competitive, sustainable and secure energy, COM(2010) 0639 final, 10.11.2010.
[310] Johnston, Angus (et al), 'The Proposed New EU Renewables Directive: Interpretation, Problems and Prospects', 1 (2008) 3 *European Energy and Environmental Law Review*, p 137-138.
[311] Just as a reminder how it was stated in Article 192 (2)(c) TFEU; "The Council acting unanimously in accordance with a special legislative procedure (--) measures significantly affecting a Member State's choice between different energy sources and the general structure of its energy supply".
[312] Van Der Elst, Renaud, '*Les defis de la nouvelle directive sur les energies renouvelables'*, in S. Hirsbrunner, D. Buschle and C. Kaddous (eds.) European Energy Law / Droit européen de l'énergie (Brussels: Bruylant 2011), p. 198.
[313] C-17/03 *VEMW and others* [2005] ECR I-4983.

law be clear, precise and predictable in their effects, in particular where they may have negative consequences on individuals and undertakings"[314].[315]

When thinking about harmonizing the support schemes one should take into account the heterogeneity of the RES- related preferences, different areas have different possibilities as well. How the authorities would decide what would be the best instrument to reach common EU renewable target? Naturally every scheme has their specific (dis-)advantages and for example in the case of nuclear, there is significant policy diversity within the EU and therefore a harmonized approach would override the diversity of risk preferences that different Member States have.[316]

The final version of the Directive 2009/28/EC contains number of provision in order to safeguard Member States' autonomy when deciding their national support schemes for renewables. Recital 25 of the Directive states;

> *"Member States have different renewable energy potentials and operate different schemes of support for energy from renewable sources at the national level. The majority of Member States apply support schemes that grant benefits solely to energy from renewable sources that is produced on their territory. For the proper functioning of national support schemes it is vital that Member States can control the effect and costs of their national support schemes according to their different potentials. One important means to achieve the aim of this Directive is to guarantee the proper functioning of national support schemes".*

One should keep in mind that, the Directive 2009/28/EC actually also already provides the possibility for Member States for cooperation such as joint projects, statistical transfers and joint support schemes.[317] However, for so far, the usage of these cooperation mechanisms has not been that great[318], exception of the joint scheme between Sweden and Norway.[319] As stated before, the current Directive leaves it to Member States to decide to which degree they want to open up their schemes to non-domestic production. Some Member

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[314] C-347/06 *ASM Brescia SpA v Comune di Rodengo Saiano* [2008] ECR I-5641.
[315] Talus, Kim, '*Introduction - Renewable Energy Disputes in the Europe and beyond: An Overview of Current Cases'*, vol. 13-issue 3 OGEL (2015) p.5-6, www.ogel.org.
[316] Johnston, Angus and Block, Guy, *EU Energy Law* (Oxford 2012), p.377.
[317] Articles 7 and 8 of Directive 2009/28/EC.
[318] Ecofys, 'Cooperation between EU Member States under the RES Directive', January 2014, available at http://www.ecofys.com/files/files/ec-ecofys-tuvienna-2014-cooperation-member-states-res-directive.pdf (last accessed 14.1.2017).
[319] Commission Staff Working Document: Impact assessment Accompanying the document Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast). SWD(2016) 418 final Part 1/ 4, 30.11.2016, p. 82.

States are however working on opening their support schemes to the participation of project developers from neighboring countries[320], also to ensure compliance with other Treaty provisions[321]. While a common framework is still absent for such cross-border access, Member States may implement national solutions and therefore possibly leading to market fragmentation.

When considering Member States' obligations under Directive 2009/28/EC, and the globally recognized urge to cut down emissions fast and significantly, it could be argued that there is an actual *need* to allow Member States to have rather large margin of flexibility when choosing their national mechanisms.[322] Therefore, Member States should have the right: "[t]o develop the most suitable and effective national support mechanisms given the current full range of possibilities, from energy taxation, to [feed-in-tariffs] or other systems providing for a technology-specific premium".[323] With this type of approach, the main criteria for the national renewable support schemes would be the compliance with the proportionality principle and the necessity of the scheme.[324] The question of support schemes compliance with the proportionality principle was already examined earlier in this study via relevant case law, and it was stated that the schemes are justified, if they pass the proportionality test. One could therefore conclude that, at least for now, the national schemes are needed and accepted as long as they are necessary and proportionate.

### 5.2 The Winter Package

As shortly mentioned in the introduction part of this study, the Commission's Winter Package[325] sets goals in order to achieve a low-carbon future: By 2030, half of the Union's electricity generation is expected to be produced from renewables, and by 2050 the aim is

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[320] Agreement between the Government of the Kingdom of Denmark and the Government of the Federal Republic of Germany on the Establishment of a Framework for the Partial Opening of National Support Schemes to support the Generation of Energy from Solar photovoltaic Projects and for the Cross-border Administration of such Projects in the Context of a Single Pilot Run in 2016. Done in Berlin, on 20 July 2016. According to the agreement, Denmark conducted a 20 MW pilot auction and opened up 2.4 MW for projects located in Germany whereas Germany opened up a complete 50 MW auction for projects located in Denmark. The auction in Denmark was based on a fixed price premium while Germany was supporting winning projects using a sliding premium payment. Both supports will be paid for 20 years.
[321] Article 30 and/or 110 TFEU.
[322] Johnston, Angus (et al), 'The Proposed New EU Renewables Directive: Interpretation, Problems and Prospects', 1 (2008) 3 *European Energy and Environmental Law Review*, p. 142.
[323] *Ibid.*, p. 143.
[324] Talus, Kim, '*The Interface between EU Energy, Environmental and Competition Law in Finland',* vol10-issue 4 OGEL (2012) p.26-27, www.ogel.org.
[325] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, the Committee of the regions and the European Investment Bank: Clean Energy For All Europeans, COM(2016), 0860 final, 30.11.2016.

to reach fully carbon-free economy. Although, the Commission realizes that the target can only be achieved when the certainty is ensured for the investors. In this regard, the new package sets down framework principles to encourage national support for the development of renewable energy. Such principles includes: cross-border support schemes; long-term visibility for the schemes; and the respect of the principle of non-retroactivity.

The proposal for a revised Renewable Energy Directive (RED) [326] is adapting a framework for renewable energy development to the 2030 perspective. The proposal is based on the existing Directive 2009/28/EC, which remains in force. The revised Directive would enter into force on 1 January 2021 (except for few provisions) and would have to be transposed into national law by 30 June 2021. It aims to increase certainty and predictability for the investors whereas also present the potential that renewable energy has in numerous sectors.

The proposal identifies six key areas for action:

(1) Creating an enabling framework for further deployment of renewables in the Electricity Sector;
(2) Mainstreaming renewables in the Heating and Cooling Sector;
(3) Decarbonising and diversifying the Transport Sector;
(4) Empowering and informing consumers;
(5) Strengthening the EU sustainability criteria for bioenergy;
(6) Making sure the EU level binding target is achieved on time and in a cost effective way.

As it was awaited, RED is also proposing new regulations which would be applicable to national RES support schemes. It was stated that RES support schemes would need to be market-orientated and cost-effective and therefore the access to the schemes should be granted in a competitive way, for example by auctioning. When establishing new schemes, the Guidelines on State aid for Environmental protection and Energy [327] need to be observed properly.

According to Article 4 of the Proposal:

[326] Commission Proposal for a Directive of the European Parliament and of the Council on the promotion of the use of energy from renewable sources (recast), COM(2016) 767 final, 30.11.2016.
[327] Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1–55.

(1): *"Subject to State aid rules, in order to reach the Union target set in Article 3(1), Member States may apply support schemes. Support schemes for electricity from renewable sources shall be designed so as to avoid unnecessary distortions of electricity markets (--)"*

(3): *"Member States shall ensure that support for renewable electricity is granted in an open, transparent, competitive, non-discriminatory and cost-effective manner."*

Article 5 of the Proposal concentrates on opening of support schemes for renewable electricity:

(1): *"Member States shall open support for electricity generated from renewable sources to generators located in other Member States under the conditions laid down in this Article."*

(2): *"Member States shall ensure that support for at least 10% of the newly-supported capacity in each year between 2021 and 2025 and at least 15% of the newly-supported capacity in each year between 2026 and 2030 is open to installations located in other Member States."*

(3): *"Support schemes may be opened to cross-border participation through, inter alia, opened tenders, joint tenders, opened certificate schemes or joint support schemes. The allocation of renewable electricity benefiting from support under opened tenders, joint tenders or opened certificate schemes towards Member States respective contributions shall be subject to a cooperation agreement setting out rules for the cross-border disbursement of funding, following the principle that energy should be counted towards the Member State funding the installation."*

The overall binding target of the Union is to ensure that the renewable energy share is at least 27 per cent by 2030. The target is only binding at the EU-level and not been translated into national targets. In order for the EU to reach its target, the revised RED would set the 2020 national targets as a baseline. This, on other words, means that from 2021 onwards Member States could not go below their 2020 national targets. It also further sets down financial support schemes for electricity produced from renewable sources. In order to move towards a gradual and partial opening of the schemes for cross-border participation in the electricity sector; opened certificate schemes, joint support schemes and opened tenders/joint tenders were listed as forms of cooperation in the proposal.[328]

[328] Not everyone was content on the package, so it will be left to be seen how the proposals will end up in the end. For example Germans have criticized the new proposal package by saying that forcing Member States to open up their markets regardless of the very different surrounding conditions may lead to distorted competition. In addition, the proposal misses the chance to stipulate concrete guidelines for the national support schemes as it was hoped to do. See more; https://www.bee-

### 5.3 Problems and challenges of the support schemes

The renewables schemes are designed to avoid carbon emissions while production, but from the other hand, as stated already before in this study, this may also create an obstacle for the EU's other goal: the integration of the EU energy market. In general, producing renewable energy is more expensive than traditional production of fossil fuels, since new innovations are more costly than using the existing ones and it is ultimately paid for by the consumers on the basis of state aid schemes or indirectly via support schemes. While the Commission tries to increase the use of renewables, it also at the same time tries to rationalize the numerous national renewable support schemes in order to support the market integration, avoid the competition distortions and naturally aim for the most cost-effective production of energy.[329] The 2009 Directive attempted to move towards more integrated markets and to make a policy that would have made renewable power a more EU policy, however as one can see from the earlier presented case-law, this approach has not been very successful.

Earlier in this study it was presented how the judgment of *Ålands Vindkraft*[330] was welcomed by the renewable energy industry and by Member States, however many stakeholders had hope that the case would have given finally an impulse to the further harmonization of the renewable energy support schemes whereas also some kind of solution for the ongoing conflict between the Commission and Member States. From the latter's point of view, the judgment was kind of a missed opportunity to get some clearance and new direction for the internal energy market.

It has been criticized that the Court saw the difficulties in the renewable support, but it made some incorrect assumptions. According to the Court, it is too difficult to track down electricity once it has gone into the system and therefore flows cannot be identified. Also, Member States should be concerned about the consumption targets, not the production, as the Court stated. In case the Court would have followed a different verdict it would have been a clear step towards support "Europeanisation". Naturally, all-at-once approach

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ev.de/home/presse/mitteilungen/detailansicht/verpasste-chance-eu-kommission-verlangsamt-europaeische-energiewende/, (last accessed 16.1.2017).

[329] Weishaar, Stefan E. and Madani, Sami, '*Energy Community Treaty and the EU Emissions Trading System: Evidence of an Unrecognized Policy Conflict*', vol 12-issue 2 OGEL (2014) p.5, www.ogel.org.

[330] C-573/12 *Ålands Vindkraft AB v Energimyndigheten* [2014] ECLI:EU:C:2014:2037.

would not work here, but this judgment could have been a first step towards more steadily development of this issue.[331]

By not being favor towards the national support schemes, the Commission tries to foster the competition and in order to make the competition possible it has also improved the infrastructure within the internal market. The Commission had 9.1 billion Euros earmarked for improving the trans-EU energy infrastructure and interconnections.[332] The guidelines for enhancing the energy infrastructure in order to advance the market integration are laid down in the Regulation 347/2013. This enhances well how the Commission tries to balance between the internal market whereas also increase the use of renewables within the EU. However, the reality is that at this very moment there is not enough capacity to transport all the subsidized electricity produced from the renewables, not to mention any kind of capacity to storage the produced electricity. When evaluating Commission's new Winter Package proposals, one could say that it actually still seems to fail to tackle the over-supply of energy; perhaps political compromise over ran yet again.

Spain was one of the first EU Member States to adopt already in the mid-90's effective national support schemes for renewable energy. By the time the EU Renewable Energy Directive 2009/28/EC was adopted, Spain was already one of the EU Member States that had penetrated the highest degree of renewables in its power system.[333] Consequently, within last 15 years, the electricity generation capacity in Spain has increased greatly and virtually doubled between 2001 and 2014.[334] In the end this has accumulated into an excessive overcapacity in Spain.[335] The overcapacity causes clear economic problems, but it also may represent a barrier for the future deployment of RES.

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[331] EEX Panel Discussion: The Elephant in the Room – Harmonisation and Governance of renewables support schemes in Europe, 4th September 2014, available at https://www.eex.com/blob/80162/12fe2133cdaf21f67a3b164fdca5ed80/20140810-eex-panel-discussion-2014-summary-pdf-data.pdf (last accessed 9.1.2017).

[332] Proposal for a Regulation of the European Parliament and of the Council establishing the Connecting Europe Facility. COM(2011) 0665 final - 2011/0302 (COD).

[333] See renewable shares in Member States. Eurostat renewables database available at http://ec.europa.eu/eurostat/web/energy/data/shares, (last accessed 18.1.2017).

[334] Commission Staff Working Document Accompanying the document report from the Commission Interim Report of the Sector Inquiry on Capacity Mechanisms SWD(2016) 119 final, 13.4.2016, p. 93.

[335] Spain is used as an example here since it has a larger excess capacity than any other EU country. According to recent data, the installed power capacity actually more than doubles the maximum peak demand in the day with the maximum electricity demand within the system. However one should note that other EU countries have had overcapacity problems as well, see more Del Río, Pablo and Janeiro, Luis, 'Research Article- Overcapacity as a Barrier to Renewable Energy Deployment: The Spanish Case'. *Hindawi*

The overcapacity is causing economic loss for both conventional and renewable generators since their assets are being underused. Reduced number of hours of operation causes consequences of overinvestment. Overcapacity also has downward pressure on wholesale power prices, while that being positive for the consumers, it however causes increased competiveness gap while increasing the need to support per unit of energy generated. Consequently, Spanish firms' cash flows are being reduced, leaving them with high debts. Therefore, one could say that the current overcapacity situation makes it more difficult to further penetrate renewables in the system. Politically justifying economic support for the new RES plants, could be a hard task, especially since they are not needed in a strict sense of ensuring the "security of supply[336]".[337] In order to mitigate the overcapacity problem, the improvements in the interconnection capacity with the Member States could be seen as one of the options.[338] The EU's Energy Union Package set a goal of a minimum interconnection target for electricity at 10 per cent of installed electricity production capacity of the Member States by 2020 and by 2030 15 per cent. Spain would certainly benefit for a better interconnection in order to deliver electricity to its neighbor countries.

The EU policy objective of sustainability is reached by promoting renewable energy and therefore reducing GHG emissions. In addition, it is also enlarging the scope of energy sources within the EU and therefore ensuring better security of supply[339], however it also creates a great challenge for example for both short- and long term electricity generation adequacy.[340]

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*Publishing Corporation Journal of Energy* Volume 2016, available at; http://dx.doi.org/10.1155/2016/8510527, (last accessed 18.1.2017), p.2-3.

[336] See more consideration about the consumers' willingness to pay for security of supply. Commission Staff Working Document Accompanying the document report from the Commission Interim Report of the Sector Inquiry on Capacity Mechanisms SWD(2016) 119 final, 13.4.2016, p. 27.

[337] According to Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1–55, para. 182: "(--) needed to secure a sufficient financing base for support to energy from renewable sources and hence help reaching the renewable energy targets set at EU level.(--)Without such compensation the financing of renewable support may be unsustainable and public acceptance of setting up ambitious renewable energy support measures may be limited. On the other hand, if such compensation is too high or awarded to too many electricity consumers, the overall funding of support to energy from renewable sources might be threatened as well and the public acceptance for renewable energy support may be equally hampered and distortions of competition and trade may be particularly high".

[338] Del Río, Pablo and Janeiro, Luis, 'Research Article- Overcapacity as a Barrier to Renewable Energy Deployment: The Spanish Case'. *Hindawi Publishing Corporation Journal of Energy* Volume 2016, available at; http://dx.doi.org/10.1155/2016/8510527, (last accessed 18.1.2017), p. 5-9.

[339] Bjørnebye Henrik, *'Investing in EU Energy Security: Exploring the Regulatory Approach to Tomorrow's Electricity Production',* (University of Oslo, PhD thesis, 2009), p. 31.

[340] Commission Staff Working Document, Generation adequacy in the internal market-guidance on public interventions, SWD(2013) 438 final, 5.11.2013, p.5.

Increasing the share of renewable energy sources in the EU energy mix increases the already volatile nature of the electricity market. The extensive renewable energy sources support schemes to promote the constructions and use of renewable energy. While these schemes encourage the renewables, they do create a market distortion in which the other energy sources will become less economically attractive and therefore they have to operate at a loss. This may potentially lead to a situation where current conventional back-up capacities are taken down as unprofitable solutions and therefore there will be the lack of this well needed capacity.[341] Whereas this creates challenges for the security of energy electricity supply short-term, since currently the energy system is not capable to handle high and low demand peaks in demand.[342] In other words, this would mean that there is a possibility of not having always enough of energy available.

As a solution for this, on the other hand, would be to subsidy also the old plants. Since the amount of investments going to traditional electricity production is reducing, we would be still able to keep the back-up capacity.[343] However, cost-wisely this is not any kind of solution at all, more the opposite.[344] Supporting two different lines of production is highly costly, and one could even ask at that point what is the point of subsidizing on top of subsidies?[345] Perhaps at that point it would be better to give the role finally for the market powers.

Since there are great number of different subsidies and taxes on individual energy sources and different variations in Member States, it is difficult to get a full picture of the total

[341] Profitability levels for conventional generation have been eroded. For example, old coal plants may be gradually phasing out and not only due to their age, but also as a consequence of environmental policies as stated in Commission Staff Working Document Accompanying the document report from the Commission Interim Report of the Sector Inquiry on Capacity Mechanisms SWD(2016) 119 final,13.4.2016, p.19-21.
[342] Opinion of the Agency for the Cooperation of Energy Regulators on Capacity Mechanisms, No. 05/2013, 14.2.2013, 5-9.
[343] For example, Poland has stated that it needs capacity market to avoid power shortages. It relies on coal for over 80 per cent of its national power generation and therefore it has been pressing ahead for the right to implement a national scheme to support domestic coal-fired generation.
[344] The energy prices and costs report re-affirms its findings from research made in 2014 that approximately €17.2billion was given as direct fossil fuel subsidies to electricity and heating in 2012, support for fossil fuels for transport were separately estimated at €24.7 billion. See European Commission staff working document Accompanying the document report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: Energy prices and costs in Europe SWD(2016) 420 final, 30.11.2016, p. 17.
[345] According to Communication from the Commission — Guidelines on State aid for environmental protection and energy 2014-2020, OJ C 200, 28.6.2014, p. 1–55, para. 220*:* "Aid for generation adequacy may contradict the objective of phasing out environmentally harmful subsidies including for fossil fuels. Member States should therefore primarily consider alternative ways of achieving generation adequacy which do not have a negative impact on the objective of phasing out environmentally or economically harmful subsidies, such as facilitating demand side management and increasing interconnection capacity."

costs of different energy sources, which makes future planning challenging.[346] In addition, some strategic reserves tend to favor older plants which operate with fossil fuels, therefore some new innovations, such as Capacity Remuneration Mechanisms (CRM), may actually favor conventional energy sources, which would actually in the long run help with the RES integration as well.[347]

The Commission has acknowledged the concerns of the renewable costs and possible impacts on the functioning of the internal market.[348] According to the Commission's consultation in 2013, over 90 % of the respondents, that represented industry, Member States and academia, found the support schemes to be a barrier for truly creating effective EU energy markets.[349] Based on the consultation, there is a clear need for policy certainty, market integration on RES and EU-level harmonization for support schemes in order to avoid further market distortions.[350] Therefore, one could perhaps argue that support schemes are not just distorting the market, but are actually a threat to the EU's energy security as well.

As an additional note, one should however keep in mind that whenever there is a discussion or a debate about the cost competitiveness of renewable energy and energy efficiency, the taxpayers are not only paying for the renewable energy subsidies, but they should also take into account the decades of extensive subsidies for fossil fuel, subsidies that remain even today. Recent studies actually show that the level of support for fossil fuels is still above what is even necessary.[351] It is estimated that consumer subsidies for

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[346] Opinion of the European Economic and Social Committee on The economic effects from electricity systems created by increased and intermittent supply from renewable sources, OJ C 198, 10.7.2013, p.3.

[347] See more about CRM Huhta, Kaisa; Kroeger, James; Oyewunmi, Oyetade and Eiamchamroonlarp, Piti, 'Legal and Policy Issues for Capacity Remuneration Mechanisms in the Evolving European Internal Energy Market', 23(3) *European Energy and Environemental Law Review* (2014).

[348] Communication from the Commission to the European Parliament and the Council, European Energy Security Strategy, COM(2014) 330 final, 28.5.2014, p.12. See also, Opinion of the European Economic and Social Committee on The economic effects from electricity systems created by increased and intermittent supply form renewables, OJ C 198, 10.7.2013, p.3-5, on how combined costs of renewable energy power stations alongside the power stations working with fossil fuels, transmission and possible storage costs among others could raise significantly the energy prices in the EU.

[349] Responses to Consultation, Generation Adequacy, Capacity Mechanisms and the Internal Market in Electricity, available at p.4. https://ec.europa.eu/energy/sites/ener/files/documents/20130207_generation_adequacy_responses_summary.pdf (last accessed 9.1.2017).

[350] *Ibid.*, p.1.

[351] OECD (2015), *OECD Companion to the Inventory of Support Measures for Fossil Fuels 2015*, OECD Publishing, Paris. Available at http://dx.doi.org/10.1787/9789264239616-en (last accessed 9.1.2017). See also how government subsidies are unnaturally and drastically affecting the global energy markets a report *Assessing Thermal Coal Production Subsidies* published by Carbon Tracker Initiative available at http://www.carbontracker.org/wp-content/uploads/2015/09/Thermal-Coal-Prod-Subsidies-final-12-9.pdf (last accessed 9.1.2017).

fossil fuel are somewhere around USD 550 billion annually, which is four times more than subsidies for renewables. One cannot deny, that globally we are still subsidizing fossil fuels regardless them causing climate change.[352]

### 5.4 Unsolved future legal question in the regards of a binding European target

One of the biggest challenges for the EU on its attempt to achieve a common internal energy market has been the environmental issues and especially introducing them into the policy framework.[353] According to the Commission, the EU is better placed to meet the climate challenges, if there is a trust and solidarity between the EU and Member States. Most of the work, in order to meet the energy goals, has to be done at national, regional and local level. In order to keep the investments coming to the energy sector also in the future, the common EU-level target is essential. If prolonged policy discussion regarding, for example the support schemes would lead to regulatory uncertainty would that naturally also impact on the instability of the investment climate.[354]

Incentives for investments could be expected to grow since the CO2 emission allowance price is sufficiently high regardless the fact that more renewables means that there will be less fossil fuel energy generation and therefore also fewer emissions. Since now the target is binding at the EU level, this has increased considerably the investments to the electricity production within the EU.[355] Naturally, one should keep in mind that the investment trends are not limited on to the EU, but the increase is global.[356] As it was noted in the IEA's

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[352] Merrill, Laura; Bassi, Andrea M.; Bridle, Richard and Christensen, Lasse T., *'Tackling Fossil Fuel Subsidies and Climate Change: Levelling the energy playing field'*, p.7. According to the report, if 30 per cent of the savings gained from the subsidies were redirected into renewable energy investments and efficiency, national emissions would actually be reduced by an average of 18 per cent by 2020. Available at http://norden.diva-portal.org/smash/get/diva2:860647/FULLTEXT02.pdf (last accessed 9.1.2017).

[353] Cameron, Peter, *'Competition in Energy Markets: Law and Regulation in the European Union'* 2nd ed. (OUP, 2008), p.515. See also: McIntyre, Owen, *'The integration challenge: Integrating environmental concerns into other EU policies'*. In European Perspective on Environmental Law and Governance, Suzanne Kingston (ed.) Routledge YK, NY (2013), p.125-143.

[354] Communications from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A policy framework for climate and energy in the period from 2020 to 2030 COM(2014) 15 final, 22.1.2014, p.2.

[355]Communications from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Progress towards completing the Internal Energy Market, COM(2014) 634 final, 13.10.2014, p.9. Bjørnebye Henrik, '*Investing in EU Energy Security: Exploring the Regulatory Approach to Tomorrow's Electricity Production',* (University of Oslo, PhD thesis, 2009), p.207-208.

[356]Talus, Kim, '*Introduction - Renewable Energy Disputes in the Europe and beyond: An Overview of Current Cases*', vol 13 issue 3 OGEL (2015). p.4, www.ogel.org. According to *World Energy Outlook 2015 Special Report on Energy and Climate Change;* it is estimated that, investments in renewable energy technologies (including hydropower) will be increasing over time, reaching at least $400 billion in 2030 and

Ministerial Meeting already back in 2015: "[w]hile certain renewables no longer require high economic incentives, they still need predictable and long-term oriented regulatory and market frameworks." Ministers further observed that with decreasing technology costs and increasing shares of wind and solar, grid integration issues and innovation at system-level would become crucial in the longer term, including a higher integration of the power, heat and transport sectors.[357]

As presented already earlier in this study, the legal basis for the EU energy policy is based on Article 194 TFEU, which makes a reference to the internal energy markets, but also a reference to the preservation and improving the environment whereas also the solidarity between Member States. According to Article 4 TFEU, energy belongs under the area of shared competences, whereas Article 194 (1) TFEU states that the EU energy policy shall aim at promoting the development of new and renewable forms of energy.

However on the other hand, the EU's overall target of 20 per cent increase of renewable energy production translates into the national targets, which vary considerable between Member States. Under the EU energy acquis, it is rather clear that some countries such as Sweden and Latvia are expected to reach very high shares in renewable energy production.[358] The Directive 2009/28/EC was adopted under Article 175 (1) EC [now 192 (1) TFEU], except the requirements related to biofuels, which were adopted under the internal market Article 95 EC [now 114 TFEU] with a majority vote. Therefore it actually seems the Directive 2009/28/EC to be in a conflict with the Treaty. According to those national targets, in some countries the renewable energy requirements means that almost half of the national electricity production should be from the renewable sources instead of traditional coal, natural gas, nuclear or other options. One could say that, this is

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inefficient fossil-fuel subsidies to end-users will be gradually phasing out. Available at https://www.iea.org/publications/freepublications/publication/WEO2015SpecialReportonEnergyandClimate Change.pdf (last accessed 9.1.2017).

[357]According to IEA, in 2014 the renewables accounted for nearly half of the growth in global electricity generation capacity, as rapidly declining costs and supportive policies, such as for solar photovoltaic, helped to deliver a record-high 130 GW of new capacity around the world. It is clear, that the rise of distributed generation, smart grids and storage technologies are rapidly changing the way energy is supplied and consumed. International Energy Agency's (IEA) Ministerial Statement on Energy and Climate Change. Available at https://www.iea.org/media/news/2015/press/IEA_Ministerial_Statement_on_Energy_and_Climate_Change.pdf (last accessed 9.1.2017).

[358] For example : UK target is 15% from a 2005 level of 1,3%, whereas the national target for Sweden is 49% from 2005 level of 39,8% and the target for Latvia is 40% from 2005 level of 32,6%). International Renewable Energy Agency (IRENA): REmap 2030 Renewable Energy Prospects: Germany, November 2015, p. 98, available at http://www.irena.org/DocumentDownloads/Publications/IRENA_REmap_Germany_report_2015.pdf (last accessed 9.1.2017). See also Talus, Kim*, 'EU Energy Law and Policy'*. 1st edn. (OUP 2013) p.193.

significantly affecting to Member State's right to choose its national energy mix between the different energy sources. Therefore, the correct legal basis would have been Article 175 (2) EC [now 192(2) TFEU].[359]

When looking at for example Germany, according to the EU Renewable Energy Directive, Germany needs to increase its renewable energy share to 18 per cent by 2020. From the EU's point of view, in order for the EU to reach its renewable target for 2020 and beyond, over the next five years Germany needs to at a minimum to maintain stable growth in its renewable energy production. Germany's 2020 target is not the highest one, Nordics and Baltic states targets are around 40 per cent or higher. However, in the EU, Germany is the single largest energy consumer with around 20 per cent of the region's total energy demand. Therefore, Germany's overall amount of renewables represents a significant share of the EU's overall renewables target and one cannot underestimate Germany's key role[360] of helping Europe to reach its 2020 and even longer term energy and climate targets.[361]

The promotion of renewable energy quite clearly affects to the Member States' choices when adopting their national energy policies.[362] Therefore, it is not that surprising that national targets have created national solutions. One could perhaps say that, in an ideal situation, since there is an EU- target there should be also an EU-wide certificate for power. However based on the acknowledgements, as presented in this study, that has not been commonly wanted solution at least for so far. It will be left to be seen if the Commission's RED proposal will set down some kind of guidance for the development of the future schemes.

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[359]Talus, Kim, *'The Interface between EU Energy, Environmental and Competition Law in Finland'*, vol 10, issue 4 OGEL (2012) p.39, www.ogel.org. Talus, Kim. *'EU Energy Law and Policy'*. 1st edn. (OUP 2013) p.180.

[360]However, it has been also critiqued that Germany is heading to opposite direction than the EU with its Energiewende, see for example; Sinn, Hans-Werner, 'Zu viele unrealistische Hoffnungen und zu wenig Pragmatismus', in: *Energiewirtschaftliche Tagesfragen*, vol. 62, No. ½ (2012) pp. 54-56, and as a contrary Strunz, Sebastian; Gawel, Erik and Lehmann, Paul, 'On the Alleged Need to Strictly Europeanise the German Energiewende'. *Intereconomics Review of European Economic Policy* Volume 49, (2014) Number 5, pp. 244-26.

[361]International Renewable Energy Agency (IRENA): REmap 2030 Renewable Energy Prospects: Germany, November 2015, p. 98. Available at http://www.irena.org/DocumentDownloads/Publications/IRENA_REmap_Germany_report_2015.pdf (last accessed 9.1.2017).

[362] Sveen, Thea, 'The interaction between Article 192 and 194 TFEU', EU Renewable Energy Law- Legal challenges and new perspectives; *MarIus* nr. 466, pp.157-183, p. 177.

# 6 CONCLUSION

European Union is seeking a leading role in the international energy field and to solve the environmental and climate protection issues by setting huge endeavors in the energy sector.[363] The new Winter Package is a clear message that the Commission wants the EU to be leading the clean energy transition[364] and not just to be adopting it. Therefore, the EU has also committed to cut CO2 emissions by at least 40 per cent by 2030 while also growing EU's economy. In order to meet the renewable targets by 2050 means great challenges when moving away from fossil fuels and that requires more investments over the upcoming years.[365]

Energy consumption in Europe is growing and especially in the field of energy sources that have a high and unstable price structure. At the same time the Union must also tackle the problem of greenhouse emissions. In addition, sources of the essential fossil fuels around the world have been concentrated to only a few countries. Europe is facing serious challenges concerning the climate change and the growing dependency on imported energy.[366] Europe has a growing need to unleash its potential in the field of sustainable and renewable sources of energy in all levels of society. The real challenge lies in the question whether or not the EU has the capacity to reduce its dependency on greenhouse gas intensive fossil fuels.[367]

One cannot trust the markets only to cope with all of this, but it is clear that state intervention is still needed. Yet again, this will raise questions related to state aid which

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[363] Pielow, Johann-Christian and Lewendel, Britta Janina 'Beyond "Lisbon": EU Competences in the field of Energy Policy'. *EU energy Law and policy Issues. ELRF Collection* vol. 3. Bram Delvaux, Michaël Hunt, Kim Talus (Eds.) (Cambridge 2012), p. 262.

[364] One could say that global warming poses a global security threat and therefore global action is needed. China is already acknowledged to be very ambitious to be the leading the world in renewable energy sector and its president *Xi Jinping* firmly asserted its commitment to climate action at the World Economic Forum in Davos this January 2017. EU leaders have stated that the global clean energy transition is here to stay and EU-China cooperation is therefore greatly needed in order to have a strong political leadership in global climate action. However, it will be left to be seen how the commitment to implement the Paris agreement will be handled in Washington. See more; https://www.bloomberg.com/news/articles/2017-01-16/climate-experts-see-xi-touting-clean-energy-leadership-at-davos (last accessed 26.1.2017).

[365] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Energy 2020, A strategy for competitive, sustainable and secure energy COM(2010) 0639 final, 10.11.2010.

[366] In 2000, it was estimated that with current trends, the EU would import 70 per cent of its energy by 2030. Currently, the amount is over 53 per cent already. Commission Green Paper, Towards a European Strategy for the security of energy supply, COM (2000) 769 final, 29.11.2000 and Communication from the Commission to the European Parliament and the Council, European Energy Security Strategy COM(2014) 330 final, 28.5.2014, p.12.

[367] http://www.erec.org/policy.html, (last accessed 9.1.2017).

will be most likely connected to the support schemes when it comes to promoting renewables. In the future, the Court must clarify this matter even more.[368] The case of *Ålands Vindkraft* highlighted that Member States do not have to open their national support schemes for outsiders. They have the right to restrict the access in order to ensure the functionality of the scheme whereas also the investment confidence, this clearly has a role in the future when considering cross-border cooperation. The judgment was both welcomed, but also greatly criticized.

When evaluating cases such as *PreussenElektra* and *Ålands Vindkraft,* whereas also taking into account variety of national, EU and international level efforts to combat against climate change by reducing greenhouse gas emissions, one could perhaps say that, whenever it is necessary and possible, the Court tries to take an effective approach to the environmental issues. The Court has now repeatedly used the infamous clause under which the desired increase of energy derived from renewable energy sources is also designed to protect the health and life on humans, animals and plants – those interests which the Court itself also identified as being among the public interest grounds contained in Article 36 TFEU. The Court seems to be adopting a bit more "relaxed" approach to Member States' environmental protection measures than what it would have taken in other cases.[369] The Court appears to be willing to accept that the application of law takes into account the surrounding realities, and therefore it prefers not to ban national environmental protection measures, naturally if only they are effective and proportionate.[370]

The environmental issues are being more and more on the focus of the EU and therefore it is not surprising the Court has clearly took a stand that the directly discriminatory national measures, even if they are obstructing intra-EU trade, may be justified on the basis of environmental protection.[371] One could even argue that the best way to guarantee the promotion of the renewable energy is to pursue its environmental purpose, since in the areas where environment and energy are combined the discretion of the Court and

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[368] Penttinen, Sirja-Leena, *'The Role of the Court of Justice of the European Union in the Energy Market Liberalization'* in Kim Talus (ed.), Research Handbook on International Energy Law (2014), p.267.
[369]Chalmers, Damien; Davies, Gareth and Monti, Giorgio, '*European Union Law'* (Cambridge University Press 2010), p. 896.
[370] Talus, Kim, *'The Interface between EU Energy, Environmental and Competition Law in Finland'*, vol 10-issue 4 OGEL (2012) p.27, www.ogel.org.
[371] C-320/03 *Commission v Republic of Austria* [2005] ECR I-9871, para. 70; C-463/01 *Commission v Germany* [2004] ECR I-11705, para. 75; C-309/02 *Radberger Getränkegesellschaft and S. Spitz* [2004] ECR I-11763.

European legislature are enhanced on the basis of it.[372] This is also the answer to the primary research question of this thesis; *whether national support schemes can be justified on the grounds of environmental protection even when they are intervening the free movement of goods within the EU.* Whereas the second part (--) *and where goes the fine line of justification*, have raised some more questions instead, when considering which one comes first, environmental protection or the integration of the internal energy market and who should be leading this development.

While the EU is aiming to fight against the climate change and therefore setting very ambitious renewable targets within the EU, it also has to be acknowledge that at the same time the need for a support in the renewable energy production has increased. Despite that, a common EU renewable support scheme is yet to emerge. According to Article 2(2) TEU, both the Union and Member States can regulate and adopt legally binding acts in a policy area in which shared competences apply. Member States however can exercise their competence only to the extent that the Union has not exercised its competence. The EU has not yet acted upon the renewable support schemes with an intention of creating one, and therefore Member States have been competent to create their national schemes. Therefore, it would seem rather logical that the lack of a common scheme would highlight Member States' right to choose the most suitable and effective way to cut down their emissions and therefore do their share in order for the EU to reach its aims.[373]

However, Member States' competence regarding the schemes does not come without reservations. The Commission has stated that while recognizing Member States' right to choose energy policies that are the most suitable to their national energy mix and preferences; this however does not mean that Member States can adopt measures that are incompatible with the objectives of market integration, competition and other energy and climate objectives.[374] One can see clearly, how there is a tension between the EU's goal to reach common energy market and on the other hand Member States' sovereignty over their energy policies. This tension can be see, both economically as legally. From economical

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[372] Sveen, Thea, 'The interaction between Article 192 and 194 TFEU'. EU Renewable Energy Law- Legal challenges and new perspectives; *MarIus* nr. 466, pp.157-183, p. 181-182.

[373] Johnston, Angus (et al), 'The Proposed New EU Renewables Directive: Interpretation, Problems and Prospects', 1 (2008) 3 *European Energy and Environmental Law Review*, p. 137-138. See also Van Der Elst, Renaud, *'Les defis de la nouvelle directive sur les energies renouvelables',* in S. Hirsbrunner, D. Buschle and C. Kaddous (eds.) European Energy Law / Droit européen de l'énergie (Bruylant 2011), p. 198.

[374] Communications from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A policy framework for climate and energy in the period from 2020 to 2030, COM(2014) 15 final, 22.1.2014, p.12.

point of view, the benefits gained from the internal market have to be scaled with the public interests such as environmental protection. There are negative sides as well when promoting renewables that one should not underestimate.

The promotion is increasing share of renewable energy sources in the EU energy mix affects to already volatile nature of the electricity market. While these schemes encourage the use of renewables, they do create a market distortion in which the traditional energy sources will become less economically attractive. This may lead to a situation where current conventional back-up capacities are taken down as unprofitable solutions and therefore there will be the lack of this well needed capacity. Whereas this creates challenges for the security of energy electricity supply short-term, since currently the energy system is not capable to handle high and low demand peaks in demand, with an addition that the storage system is basically nonexistent. In other words, this would mean that there is a possibility of not having always enough of energy available, at least hypothetically.

As presented earlier in this study, a solution for this would be to subsidy the old plans as well in order to keep the back-up capacity. However, cost-wisely it does not sound very wise to support two different lines of production. Instead of subsidizing on top of subsidies, perhaps it would be time to give the floor for the market powers. Renewables should be exposed to the market risk, since it would increase the efficiency, but naturally it would also show in the prices as well. In addition, one should realize that fossils are still needed alongside the renewables in order to move towards the low-carbon economy. In order to get flexibility, market-based support schemes should be supported, such as biomass and hydropower storage.

One should keep in mind that, the EU whereas also Member States have obligations towards third countries and organizations when it comes to trade, investments and environmental protection which they need to consider when creating their renewable energy policies.[375] Therefore, more efficient, economical and secure energy can only be

[375] Leal-Arcas, Rafael and Filis, Andrew, 'Legal Aspects of the Promotion of Renewable Energy within the EU and in Relation to the EU's Obligations in the WTO' (August 19, 2014). *Renewable Energy Law and Policy Review,* Issue 1/2014, pp.3-25; Queen Mary School of Law Legal Studies Research Paper No. 179/2014. Available at SSRN: https://ssrn.com/abstract=2482943 (last accessed 27.1.2017), p.3.

achieved if Member States "speak with one voice"[376], therefore it would be highly important to get some kind of a solution for this ongoing situation, the kind of clarifying one that the *Ålands Vindkraft* for example in some sense failed to give.

Currently, the EU is still mainly based on the conventional energy sources such as gas, oil and coal and moving from these sources to the renewable energy sources will pose challenges for sure, both within the EU as well as in the external relations with countries that are in charge of the conventional energy sources.[377] Replacing the hydrocarbons, such as gas, coal and oil, would mean liberation in many ways for the Union. At the moment, the EU is depending on external oil and gas from Russia and OPEC countries[378], so favoring the renewable energy sources would reduce the impact of these external actors. Nuclear energy brings the safety risk and the decommissioning uncertainty with it, whereas contributing the climate change by using the hydrocarbons creates guilt.[379]

When looking at energy sector's future, there should be created policies that are creating economically feasible-solutions in a scale that would boost technological innovations. Policies should be such as to support research, development and demonstration and carbon pricing, while also fully leveraging the financial assets and private sector possibilities. It is clear that, deep cuts in global greenhouse-gas emissions are needed in order to hold the increase the global average temperature below the 2°C above pre-industrial levels. In order to promote energy security; sustainable, clean and safe low carbon technologies and energy efficiency are essential.

It is rather clear in some sense that there is a conflict between environmental protection and economic development and growth.[380] Therefore, long-term climate goals should include further promotion of energy security while aiming to offer affordable and reliable

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[376] Commission Communication: An EU Energy Security and Solidarity Action Plan, COM(2008) 781 final, 13.11.2008, pp.3 and 17. Kuhlmann, Josefine, '*Kompetenzrechtliche Neuerungen im europäischen Energierecht nach dem Vertrag von Lissabon'*. EI Working Papers / Europainstitut, 79. Europainstitut, WU Vienna University of Economics and Business, Vienna. (2008), available at http://epub.wu.ac.at/1072/1/document.pdf (last accessed in 9.1.2017), p.8.

[377] Jäger-Waldau, Alnuf; Szabó, Sandor; Scarlat, Nicolae and Monforti-Ferrario,Fabio, 'Renewable Electricity in Europe', *Renewable and Sustainable Energy Reviews*, vol.15, issue 8, (2011) pp. 3706-3707.

[378] The Organization of the Petroleum Exporting Countries (OPEC) was founded in Baghdad, Iraq, with the signing of an agreement in September 1960 by five countries. Currently, the Organization has a total of 12 Member Countries. (http://www.opec.org/opec_web/en/17.htm).

[379] Talus, Kim, '*EU Energy Law and Policy: A Critical Account' (*OUP 2013) p. 191.

[380] Beckerman, Wilfred, '*Economic Development and the Environment: Conflict or Complementarity?*', 1992. Available at http://wwwwds.worldbank.org/servlet/WDSContentServer/WDSP/IB/1992/08/01/000009265_3961003070505/Rendered/PDF/multi0page.pdf, (last accessed 9.1.2017).

energy solutions for everyone. In order to foster economic growth, technological innovations and sufficient investments are essential. Whereas attracting investments, the regulatory environment needs to be stable and reliable. This is where at the EU level both single Member States and the EU as a whole play the key roles. The new Winter Package of the Commission is at least trying to be the answer for some of these needs. The legislative proposals of the Package will still go through the Ordinary Legislative Procedure before becoming binding Union legislation, so it will be left to be seen how the European Parliament and the Council will agree on the common text and the proposals.